Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota	))))))))	WC Docket No. 02-148

REPLY COMMENTS OF AT&T CORP.

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Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

INTRODUCTION AND SUMMARY

Despite its flurry of last-minute (and still ongoing) amendments to its SGATs in Colorado, Idaho, Iowa, Nebraska and North Dakota, Qwest's Application unquestionably falls short of the core requirements of section 271 in a number of significant respects. These gaps are clear and largely undisputed. Qwest continues to discriminate in countless (and still largely undisclosed) respects in favor of its secret deal partners. As third party testing, performance data and, in a few respects, even state regulators' candid comments confirm, Qwest plainly has not yet attained OSS parity. Qwest's interconnection terms violate the Act in more than a dozen ways, including some that the Commission has already expressly recognized in other decisions. Qwest's non-recurring rates remain far above any reasonable TELRIC range, and its claims that it has reduced its Idaho, Iowa, Nebraska and North Dakota rates to Colorado levels are demonstrably false. The comments detail additional checklist and public interest shortfalls.

Indeed, the joint application falls short in more respects than *any* recent application for section 271 authority.

Qwest's instant application also is set apart from any other recent 271 application by Qwest's reliance on numerous deceptive tactics. For example, the Commission has on at least three occasions *adjudicated* Qwest (or US West before it) responsible for violating section 271 of the Act, and Qwest continues to violate Section 271. Qwest has demonstrated its disregard for its section 251 and 252 obligations, by, among other things, entering into patently discriminatory secret interconnection deals with favored CLECs, including deals in which Qwest attempted to evade informed state commission and FCC review of its compliance with section 271 checklist requirements by buying the silence of complaining CLECs in these regulatory proceedings. Qwest's efforts to inhibit local entry have also included "freezing" local service accounts to prevent customers from switching to competitive carriers, refusing to allow CLECs even to test competitive offerings and refusing to provide access to inside wiring in multiple dwelling units.

Qwest also uses misrepresentations and omissions to mask its failure to provide nondiscriminatory access to its OSS. Although Qwest extols the KPMG test of its OSS as proof that it has met its OSS obligations, KPMG found at the end of the testing that the OSS continued to be deficient in a number of areas (including the adequacy of Qwest's manual processing and testing environment) – but Qwest refused to allow any retesting to determine whether the deficiencies had been eliminated, notwithstanding KPMG's recommendation to the contrary, in order to force the testing to end on May 28 as scheduled. Moreover, Qwest conveniently ignores the fact that the results of the KPMG test were overstated, since some of the data and information on which KPMG relied was from CLECs who were given preferential treatment by Qwest under secret agreements.

Qwest's description of its OSS performance in the real-world context is equally misleading. For example, Qwest conveniently fails to mention in its application the high rates of CLEC orders that are rejected by its OSS, and the high rates of non-rejected orders that Qwest manually processes. In addition, as evidence that its manual processing of CLEC orders is accurate, Qwest included data in its application on "service order accuracy" that – in a subsequent *ex parte* – Qwest acknowledged was erroneous. By themselves, these misrepresentations render unreliable Qwest's claim that it has met the requirements of Section 271.

Qwest's pricing case is no better. Qwest initially filed testimony swearing that its rates in those four states did compare favorably to Colorado. But, after CLECs pointed out that Qwest's analysis was infected by numerous clear errors and that Qwest's rates in those states do not, in fact, pass the Commission's benchmarking analysis, Qwest frankly conceded that it made a fundamental error in its benchmarking analysis. Qwest's rates do not, in fact, satisfy the Commission's benchmarking analysis. Critically, rather than agreeing to address all of those problems, Qwest has continued its gamesmanship by reshuffling rate elements to different categories in the hope that it will pass the Commission's benchmarking test.

These are, of course, difficult times for Qwest, and many will urge the Commission to look past these fatal defects on the theory that Qwest simply cannot weather more bad news. The Commission must not do that. In this time of national resolve to establish and mandate corporate responsibility through effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's inadequate showing in this proceeding.

To be sure, the easy, non-confrontational course is to shift the analysis of Qwest's compliance with the Act's requirements to future proceedings, where monetary penalties could be assessed, or improvidently granted section 271 authority could be suspended or revoked. But the Act requires more responsible adherence to its terms. The Commission cannot sway from its statutory obligation to ensure that the record *in this proceeding* adequately supports the conclusion that Qwest *presently* complies with the checklist and public interest requirements, and has met its burden under Section 271. Under that standard, the joint application must be denied.

Although that would be the appropriate course on this record even if Qwest had sought interLATA authority in only a single state, the peril of deviating from the letter and core purposes of the Act is particularly stark here. In a transparent effort to finish its 271 race before complete testing, performance data and state and federal civil and criminal investigations expose even more problems, Qwest, in this and its follow-on application, seeks an unprecedented 10-state stamp of approval. If the Commission buys into this strategy, Qwest's section 271 incentive to complete the process of opening its local markets to competition will disappear virtually overnight. In short, this clearly is the time and the case for the Commission to demonstrate the courage of the convictions that underlie the Act. Doing so is not "unfair" to Qwest in any respect – Qwest's problems in this proceeding are entirely of its own making, and it will remain entirely within Qwest's power to take the remaining steps that are necessary to meet all of the pre-conditions to interLATA authority.

The remainder of these reply comments is organized as follows:

In Part I, AT&T explains that the record in this proceeding relating to Qwest's "secret deals" conclusively proves that Qwest is not providing nondiscriminatory access to its bottleneck local network facilities as required by multiple checklist items. Qwest indisputably provides better prices and other terms to some CLECs than others. Moreover, Qwest's special treatment of its secret deal partners has given an inflated and otherwise false view of Qwest's treatment of CLECs and of the openness of its local markets to competition. The efficacy of Qwest's OSS tests, for example, has been compromised, because they relied in material part on evaluation of service provided to favorably-treated carriers. And at the very same time, Qwest's approach of "buying off" CLECs that were bringing forward evidence of Qwest's many failures to adhere to the Act's market opening requirements has subverted the entire Section 271 process. Under these circumstances, Qwest cannot possibly establish nondiscrimination, and that fact alone precludes granting the joint application.

Part II shows that the comments overwhelmingly confirm that Qwest has failed to satisfy its burden of providing that its OSS systems are non-discriminatory. Qwest fails to provide an adequate change management process. As explained by KPMG, many of the provisions of Qwest's "redesigned" CMP are too recent to evaluate, and Qwest provides no hard evidence of its compliance with its 'new and improved' change management process. Qwest likewise fails to provide a stable test environment that mirrors, but is separate from, the production environment.

The comments further confirm that Qwest's interfaces fail to provide CLECs with access to OSS functionality that is equivalent to that which Qwest enjoys in its retail operations. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects: (1) Qwest has not provided CLECs with the ability to integrate EDI ordering and ordering functions successfully (2) Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself; (3) Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing before actual provisioning; and (4) Qwest fails to provide nondiscriminatory access to pre-ordering functions, because it changes due dates for CLEC orders far more frequently than for its own retail orders.

Likewise, Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. Qwest's systems are plagued by high-rates of order rejection, manual processing of electronically submitted CLEC orders, and manual errors. Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. Qwest's billing systems are patently inadequate. Qwest does not provide complete, accurate, and timely daily usage files ("DUFs") and wholesale bills to CLECs. In addition to the numerous billing errors that AT&T described in its opening comments, for example, Eschelon states that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUF records do not include minutes of use for intraLATA toll traffic carried by Qwest.

In addition, the comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance. The Liberty and Cap Gemini Ernst & Young performance measurement audits were not designed to test and did not test the accuracy of Qwest's raw data inputs; the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope. According to the Idaho PUC, KPMG's OSS "testing revealed an unacceptably high level of human error in the manual processing of orders," and "the problems persisted" after retesting. Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data.

Even Qwest's inadequate and unreliable data show that it has not satisfied its checklist obligations. Qwest's rejection rates are unacceptably high by any commercial standard. As demonstrated by the comments, Qwest's total flow through rates are inadequate and rely excessively on manual processing which increases the risk of provisioning error and delay. And Qwest also fails to provide timely, accurate and complete status notices.

Part III shows that the commenters, the DOJ, and even Qwest itself confirm that Qwest has failed to satisfy its burden of proving that its rates comply with Checklist Item II. Qwest relies on a benchmarking analysis against Colorado to justify its rates in the other four states in its application. But Qwest has now conceded that its rates in some of those states do not, in fact, satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state. Rather than withdrawing its application, Qwest is now scrambling to file new rates for those states. Even worse, Qwest's description of the new rates that it plans to file confirm that Qwest does not plan to actually lower its rates sufficiently to address the errors identified by the commenters and the DOJ. Instead, Qwest plans to reduce some rates, and to move other rates to different cost categories so that those rates will no longer affect the benchmarking analysis. This shell game cannot change the dispositive fact that Qwest's rates in four of the five states were not developed based on TELRIC principles and do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

Moreover, the comments confirm that Qwest's Colorado recurring and non-recurring rates are inflated by TELRIC errors that substantially inflate those rates. Thus, even if the rates in the other four states were equivalent to those in Colorado (which they are not), that analysis would not show that the rates in those states are TELRIC-compliant. The fact that the rates in some of the states in Qwest's Application are overstated is further confirmed by the fact that local entry is not economically feasible. On this record, there can be no finding that Qwest's rates comply with Checklist Item 2.

Part IV addresses two recent developments that further confirm, as AT&T demonstrated in its initial comments, that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, in violation of its checklist obligations. First, the Commission has now confirmed in the *Virginia Arbitration Order* that the exception to the unbundled switching requirement for customers with four or more lines "applies on a 'per location' basis," and not on a "per-customer per wire center" basis, as Qwest's SGATs provide. Second, Covad has demonstrated that Qwest's refusal to build facilities for CLECs on the same terms that it builds for itself is discriminatory and unlawful: When facilities are not available, rather than holding the order as it does for its retail customers, Qwest simply rejects the order (either immediately, as in Idaho, Nebraska, and North Dakota, or after 30 days, as in Colorado and Iowa).

Part V shows Qwest has failed to meet its burden of establishing that Qwest and its section 272 affiliate will comply with each of the requirements of section 272 if Qwest's application is granted. None of the state commissions even addresses Qwest's failure, as found by the Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Nor do the state commissions rebut the fact that Qwest and its section 272 affiliate fail to comply with the requirement that they have "separate officers, directors, and employees," as found by the Minnesota ALJ. The state commissions are also silent with respect to the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions, because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all their transactions. And no commenter addresses Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g).

Part VI shows that granting the joint application is not in the public interest. As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Qwest has engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it has launched illicit efforts to provide service across LATA boundaries. In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing or to provide access to inside wiring in multiple dwelling units. And Qwest has been revealed to have entered patently discriminatory secret interconnection deals. By failing to file the agreements as required by Section 252, and worse yet, by attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs, Qwest has made it clear that there is no reason for the Commission to give it the benefit of the doubt in its review of this unprecedented application.

Finally, Qwest's performance enforcement plans do not provide sufficient assurance that Qwest will comply with its statutory obligations in the future. The state regulatory commissions simply do not come to grips with AT&T's showing that the unreliability of Qwest's performance data, which serve as the springboard for remedies payments, would thwart the efficacy of the performance assurance plans. And even if Qwest's performance data were accurate, Qwest's performance assurance plans contain fundamental flaws that prevent them from serving as an effective deterrent against future backsliding. Qwest's initial five state joint application should be denied.

I. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

The comments confirm that the Commission cannot approve Qwest's Application on the existing record because of the overwhelming "secret deals" evidence that Qwest is not, as required by multiple checklist items, providing nondiscriminatory access to its bottleneck local network facilities.[1] Moreover, because it is now clear that in some cases, the favored CLECs agreed in return to acquiesce in proceedings before state commissions and this Commission with respect to Qwest's instant section 271 Applications, Qwest has prevented full development of the regulatory record. By buying the silence of CLECs, Qwest has rendered the record on critical issues such as checklist compliance unreliable, and like the thirteenth chime of a clock, has cast the entire review mechanism into doubt. Worse still, the record evidence of Qwest's commercial performance and other obligations has been skewed by data from secret deals partners that received special treatment that is not available to other CLECs, rendering this evidence useless in determining Qwest's present checklist compliance. Under these circumstances, the Commission cannot make a reasoned finding of checklist compliance that would survive judicial review.

The comments remove any possible doubt that Qwest has entered into blatantly discriminatory agreements with favored CLECs, giving them preferential UNE rates and superior

[1] *See* 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of sections 251(c)).

access to UNEs to the competitive detriment of all others.[2] In addition, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.[3] Indeed, as AT&T demonstrated, the Iowa Utilities Board and the Arizona Commission Staff have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions.[4] The Arizona Commission Staff further noted the "egregious nature of [Qwest's] infraction" with respect to seven agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[5]

Qwest's ongoing secret deals discrimination – the existence of which cannot be disputed – is fatal to its Application. As several commenters point out, the secret agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest's obligation to provide "access" to its network facilities on terms and conditions that are "nondiscriminatory," 47 U.S.C. § 271(c)(2)(B)(ii), and likewise of the other checklist items that require nondiscrimination.[6]

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[2] *See* CompTel Comments at 14-15; New Edge Comments at 3-4; Touch America Comments at 24-25.

[3] *See* Touch America Comments at 24-25.

[4] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 to AT&T's Comments); *Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 to AT&T's Comments).

[5] Arizona Report at 1-2, 19.

[6] *See* CompTel Comments at 14 (If Qwest granted preferential treatment to selected CLECs, "then Qwest has not provided non-discriminatory access to unbundled network elements as required by checklist item ii"); New Edge Comments at 3-4 (citing two unfiled agreements between Qwest and CLECs as examples of "instances where Qwest does not provide access to network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory"); Touch America Comments at 24 (Qwest's secret agreements "hav[e] an anti-competitive and discriminatory impact on competitive carrier operations").

DOJ acknowledges that the allegations of discrimination are "serious and deserve the Commission's careful attention."[7] It nevertheless concludes that "such allegations of past discrimination do not appear to implicate the Department's inquiry into whether local exchange markets are fully and irreversibly open to competition for purposes of providing its Evaluation of a pending Section 271 application to the Commission."[8] That conclusion simply ignores the mounting evidence that Qwest's discrimination is *ongoing*, not a *past* practice that has terminated. The state investigations are in progress and there is no basis to assert that Qwest has ceased entering into or performing under discriminatory agreements. Indeed, state commissions are still trying to identify all of Qwest's unfiled agreements through data requests and subpoenas.[9] If – as is clearly the case – Qwest continues to discriminate in the provision of interconnection and access to network elements, there is plainly no basis for a Commission finding that Qwest is presently offering interconnection and access to network elements on a *non*discriminatory basis.

Any suggestion that the Commission can ignore Qwest's discrimination in this proceeding and, instead, address it "through dockets in which such matters are directly under investigation," flies in the face of section 271.[10] The fundamental purpose of the section 271 approval process is for the Commission to consider precisely these issues. Section 271 expressly provides that "[t]he Commission *shall not approve* the authorization requested . . . unless it finds that" the applicant has "fully implemented" the requirements of the competitive checklist.[11] By

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[7] DOJ Eval. at 3.

[8] *Id.* at 3-4.

[9] *See* Iowa Order at 21 (ordering Qwest to "file any other non-filed interconnection agreements with the Board" within 60 days); Arizona Report at 20 n.4 ("These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).").

[10] DOJ Eval. at 3.

[11] 47 U.S.C. § 271(d)(3) (emphasis added).

requiring that all checklist requirements are satisfied *before* the BOC enters the long-distance market, section 271 ensures that BOCs do not enter the long-distance market at a time when they are able to leverage their local monopoly power into the long-distance market. Accordingly, DOJ's suggestion that the Commission should address Qwest's discrimination in other proceedings and, if it later finds a violation, levy sanctions including "suspension or revocation of any Section 271 authority that the Commission may have granted in the interim," plainly has the cart before the horse.[12] The Commission has a statutory obligation to address the allegations in *this* proceeding, and cannot grant the joint application with respect to *any* state unless it concludes that Qwest currently is satisfying all checklist obligations.

Several commenters agree that Qwest's secret deals discrimination precludes approval of its section 271 Applications because the regulatory records, before both state commissions and this Commission, are unreliable.[13] Significantly, DOJ acknowledges the "questions as to the quality of the record," noting that "[p]erformance data relating to the CLECs that are alleged to have received preferential treatment are included in the aggregate data included in Qwest's filing and were relied upon by KPMG" during portions of the OSS test.[14] DOJ further acknowledges that "[t]he three-year process [of gathering performance data] might well have been more efficient and comprehensive with the full and open participation of all interested CLECs."[15] Despite these acknowledgements, however, DOJ concludes that "the fact that certain CLECs did

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[12] DOJ Eval. at 3.

[13] Comptel Comments at 15 (asking the Commission to "separate Qwest's wholesale performance data for carriers that are alleged to have unfiled interconnection agreements from the aggregate wholesale performance results" because "carriers that might have received different wholesale performance from Qwest could skew Qwest's overall performance in a positive direction"); New Edge Comments at 4 (noting that Qwest's agreement with CLEC to provide Qwest personnel on-site to assist with OSS issues "calls into question the results of Qwest's OSS testing and performance results" because "these results are likely to be more favorable than what the competitive provider would have experienced without the Qwest personnel on site"); Touch America Comments at 25 ("the secret CLEC agreements have denied the states and the Commission the opportunity to develop a full and complete record for reviewing Qwest's requests for 271 authority").

[14] DOJ Eval. at 4.

not participate does not appear to have had a significant impact on the result."[16] This conclusion is wholly unsubstantiated. Indeed, it could not be substantiated because DOJ cannot know what the CLECs who were bought off *would have contributed to the record* if they had not been silenced or how much Qwest's special treatment of its secret deals partners skewed the performance and other data.

Nor can there be any serious suggestion that the burden is upon commenters to prove the scope of the discrimination and harm to the record caused by Qwest's secret deals misconduct. Qwest has, of course, made that impossible by refusing to disclose the full nature of its discrimination and insisting that this proceeding go forward before KPMG and state commissions could conduct the full investigations that would be required to eradicate the secret deals distortion. In any event, it is *Qwest's* burden here to prove checklist compliance, and it is Qwest that is attempting to rely upon performance data and state commission findings that it knows were distorted by its misconduct. It is therefore Qwest's burden to prove that its pervasive discrimination had no material impact on the evidence upon which it attempts to rely. Qwest has not even attempted to do so.

DOJ also asserts that "any enhanced performance caused by the allegedly preferential treatment will have resulted in higher benchmarks for Qwest to maintain."[17] This again ignores that the fundamental purpose of section 271 is to prevent Qwest from entering the long-distance market in the first place unless and until Qwest meets its burden of satisfying all checklist requirements, which it cannot do if the record of its current performance is unreliable. If the Commission were to prematurely approve the joint application on the basis of skewed or

[15] *Id.* at 5.
[16] *Id.*
[17] *Id.*

inaccurate performance data – and in the process send a message to the industry that section 271 application will be approved notwithstanding such misconduct – then "higher" benchmarks would be of little use in preventing Qwest (or, for that matter any RBOC) from exercising monopoly power in the long-distance market. The bottom line is this: it is undisputed that Qwest has been – and is – discriminating, and there is no rational basis for the Commission to conclude that this discrimination is immaterial or that Qwest has met its checklist burdens despite that discrimination.

Qwest's failure to fully disclose the nature of its secret deals has a second and independent consequence: it violates Commission Rule 1.17. Rule 1.17 states that "[n]o applicant . . .shall . . . *in any application*, pleading, report or in any other written statement submitted to the Commission, make any misrepresentation or willful material *omission* bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. 1.17. Moreover, both the D.C. Circuit and the Commission have emphasized that the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. *See Rainbow Broadcasting Co.*, 13 FCC Rcd. 21000, ¶ 25 (1998); *Swan Creek Communications* v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). As explained above, there is no question that any documents or other written evidence relating to Qwest's secret deals with CLECs are material to this proceeding. Indeed, that material is necessary to fully assess the scope and extent of the discrimination caused by those secret deals. And those documents must be made available to, and reviewed by this Commission or the state commissions before any reasoned finding can be made that Qwest has complied with the competitive checklist, or that a grant of Qwest's application is in the public interest.[18] Qwest's failure to include with its

[18] The Commission recently noted the importance of a full Section 271 record. In fining SBC for misstatements in its Kansas/Oklahoma section 271 application, the Commission emphasized that "[s]ection 271 proceedings are at the

application the content of the secret deals it has entered into with selected CLECs leaves the Commission uninformed of information that is material to Qwest's Application.[19] Qwest's application is therefore deficient and must be denied.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO OSS.

The comments confirm that Qwest fails to provide an adequate change management process, a stable test environment that mirrors (but is separate from) the production environment, and the same access to OSS functions as that enjoyed by its own retail operations.[20] Remarkably, even the statements of some of the state regulatory commissions that have blessed Qwest's OSS demonstrate that Qwest is *not* currently meeting those obligations. All too often, however, the state commissions excuse discrimination and poor performance by Qwest, either by asserting that they will monitor Qwest's performance in the future or by citing to the current (or possible) inclusion of certain performance metrics in Qwest's performance assurance plans to ensure that Qwest will meet its obligations in the future.[21] These rationalizations are simply

center of Congress' efforts to promote competition in the Telecommunications Act of 1996. They are the subject of significant litigation. For SBC to keep the parties and the Commission uninformed of material inaccuracies relating to its Section 271 application is extremely serious." *See SBC Communications, Inc.,* Notice of Apparent Liability For Forfeiture and Order, FCC 01-308, ¶ 59 (released October 16, 2001).

[19] Moreover, the law ordinarily teaches that "the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." WIGMORE ON EVIDENCE § 285 (1940); *see also* McCORMICK ON EVIDENCE § 272 (1984) (espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (footnote omitted)).

[20] *See* AT&T at 28-46; CompTel at 3-7; Covad at 13-31, 39-42; Eschelon at 6-28; New Edge at 4-5; Touch America at 4-5; Vanion at 7-8; WorldCom at 1-23.

[21] *See, e.g.,* CPUC at 38-39, 42, 51; IPUC at 6-7, 11-12; NDPSC Consultative Report at 203. To the extent that the bases offered by the State commissions for their finding that Qwest meets its OSS obligations are the same as those advanced by Qwest in its Application, they have already been addressed by AT&T in its opening comments, and will not be addressed here.

irrelevant to the issue of whether – as Qwest must establish – Qwest has met its burden to establish that it is *currently* in compliance with its OSS obligations.[22]

The comments also show that third-party testing of Qwest's OSS by KPMG Consulting ("KPMG") is of no real-world value because the results were based on input from CLECs which received preferential secret deals treatment from Qwest that is not available to other carriers.[23] The KPMG test results thus clearly overstate Qwest's actual performance. Moreover, the state commissions that claim that the KPMG test shows that Qwest is providing nondiscriminatory access ignore KPMG's own disclaimer that it could make no such determination.[24] In any event, "KPMG continued to deem Qwest's performance unsatisfactory with respect to a number of important issues," and the KPMG test "ended with a number of important issues unresolved because Qwest unilaterally determined that certain issues should not be retested."[25] There is no basis on this record for a Commission finding that Qwest has met its OSS burden.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

The comments confirm that Qwest's change management process ("CMP") is inadequate under the standards established by the Commission. First, Qwest has not established that it has

[22] *See, e.g., Michigan 271 Order* ¶¶ 55, 179 (BOC's promises of future compliance are irrelevant to issue of whether BOC is currently in compliance with Section 271).

[23] AT&T at 29-30; New Edge at 4; WorldCom at 4. The CPUC attempts to minimize the effect of the secret agreements on the results of the KPMG testing, asserting that KPMG did not have "any concerns about the information" but considered the issue only as a "pro-active" effort in anticipation "that questions would arise." CPUC at 40-41. That is wrong. Even though its "CLEC participation study" focused on only three of the CLECs who received preferential treatment from Qwest, KPMG acknowledged that some of the findings and conclusions in its Final Report were based, at least in part, on information and data obtained from these CLECs. *See* AT&T at 30 & Finnegan/Connolly/Menezes Decl. ¶¶ 16-17 & Atts. 2-3. Moreover, KPMG acknowledged that it had not audited the accuracy and completeness of the data received form these CLECs, had not investigated whether such data were consistent with data held by other CLECs, and had not reviewed any of the secret agreements. *Id.* KPMG nonetheless declined to determine the precise impact of the secret agreements on the test results, despite AT&T's express request that it do so. AT&T at 30 & Finnegan/Connolly/Menezes Decl. ¶ 18 & Atts. 4-6.

[24] *See* CPUC at 2; IUB at 32; NDPSC at 7; AT&T Finnegan/Connolly/Menezes Decl. ¶ 15.

[25] WorldCom at 3. *See also* AT&T at 30.

"adhered to this process over time."[26] Second, Qwest has not met the Commission's requirement that it establish a stable testing environment that mirrors, but is separate from, the production environment.[27] Because a change management process "can make or break competition,"[28] these deficiencies in Qwest's CMP, by themselves, require denial of the Application.

Failure to Demonstrate Adherence to an Adequate Change Management Process. As KPMG's Final Report confirmed, many of the provisions of Qwest's "redesigned" CMP are too recent, or not yet mature enough, to evaluate.[29] Qwest's application "provides no hard evidence of its compliance with its 'new and improved' change management process," but simply engages in "an extensive discussion of administrative milestones that it has met and promises about how it will comply with the [CMP] on a prospective basis."[30] For that reason, the state commissions' discussion of CMP compliance is necessarily cursory and unaccompanied by any basis or evidence to support their recommendations.[31] Although some state commissions attempt to

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[26]*New Jersey 271 Order*, App. C ¶ 40; *Georgia/Louisiana 271 Order*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102.

[27]*New Jersey 271 Order*, App. C ¶ 42; *New York 271 Order* ¶¶ 109-110.

[28]Nebraska Public Service Commission, Application No. C-1830, *In the Matter of Qwest Corporation, Denver Colorado, filing its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify Qwest Corporation's compliance with Section 271(c),* Order Approving Qwest's Change Management Process, entered June 12, 2002 ("NPSC CMP Order"), at 5 (¶ 16). *See also, e.g., New Jersey 271 Order*, App. C ¶ 41 ("Change management problems can impair a competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(2)(B)(ii)").

[29]AT&T at 31-35; CompTel at 7; Eschelon at 27-28;; New Edge at 4; WorldCom at 20.

[30] CompTel at 7.

[31]*See* CPUC at 52-53 (asserting only that Qwest "has adhered to" the bulk of the provisions of the CMP that "have been in place for months," that Qwest has implemented provisions of the CMP "[a]s language was agreed to in the redesign process," and that Qwest has followed "the basic process of prioritization" for two releases); IPUC at 12 (stating only that "there is a record of following individual elements of the process as agreement was reached on each element"); IUB at 39 (simply citing previous decision finding "that Qwest satisfied the requirements related to the CMP"); IUB Docket Nos. INU-00-2 and SPU-00-11, Conditional Statement Regarding Change Management Process Compliance, dated June 12, 2002, at 21-30 (rejecting CLECs' arguments regarding lack of compliance, but providing no basis for finding that Qwest had met its burden of providing a pattern of compliance); NPSC CMP Order at 3 (claiming that Qwest compiled an "overall compliance rate" of 98 percent – without specifying any basis or description for the 98 percent figure); NDPSC Consultative Report at 174 (finding that Qwest had established pattern of compliance by performing such tasks as "conducting meetings to clarify CLEC change requests" and by assigning a "pattern of quickly implementing the agreements reached in the redesign process"). The fact that Qwest implemented a particular element of the CMP once language was agreed upon begs the question of whether Qwest

dismiss as irrelevant or immaterial the inability of KPMG to determine Qwest's compliance with the CMP (others do not address KPMG's compliance findings at all),[32] the IUB acknowledges that the "adherence that KPMG was able to observe appeared to be 'piece-meal' rather than end to end."[33]

Given the findings of both KPMG and Cap Gemini in their third-party testing that the CMP is too new to determine whether Qwest had established a pattern of compliance, it is clearly "too early to conclude that Qwest is complying with the redesigned process." [34]

Inadequate Test Environment. The comments likewise confirm that neither of Qwest's testing environments meets the requirement that a BOC provide a stable testing environment that mirrors the production environment and is physically separate from it.[35] Qwest's "Interoperability Environment" is not separate from the production environment because it uses actual production systems, and fails to mirror the production environment because it returns all

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has adhered to that element "over time." Stated otherwise, implementation is meaningless without actual compliance.

[32] Although the Idaho PUC acknowledges the comments on this issue filed in its proceedings by AT&T regarding the KPMG test, the IPUC's discussion of the compliance issue makes no reference to the KPMG test. IPUC at 6, 12 & Exh. E at 25-26. Nor do the Nebraska or North Dakota commissions consider KPMG's findings in their analyses of Qwest's compliance with the CMP. NPSC CMP Order at 3 (¶¶ 7-8); NDPSC Consultative Report at 174. Although the Colorado PUC and Iowa Utilities Board address the findings of the KPMG test, their reasons for finding them insufficient to warrant a finding of noncompliance are not only without merit, but inconsistent. For example, although the IUB (like Qwest) asserts that KPMG's Exception 3094 regarding Qwest's compliance with the "product/process" CMP is outside the scope of Section 271, the CPUC finds that a CMP is *not* complete absent such a CMP. The CPUC nonetheless finds Qwest in compliance by citing (without elaboration) its "own evaluation" of product/process notifications by Qwest since April. CPUC at 48; IUB at 21. As one of its bases for rejecting KPMG's Exception 3111 (regarding Qwest's failure to provide notifications of changes in a consistent and timely manner), the CPUC even offered the rationalization that "In all likelihood, KPMG would have found that Qwest satisfied this criterion *given another month or two of testing.*" CPUC at 46 (emphasis added).

[33] IUB at 27. Although finding that Qwest "has compiled an adequate record of compliance with the redesigned CMP," the Nebraska PSC expressed concern regarding Qwest's local service freeze, which Qwest implemented even though "CLECs had not been informed" and "Qwest's front line people had little or no knowledge of the changes." *See* NPSC CM Order at 3 (¶ 8); NPSC Comments, Concurring Opinion of Commissioner Boyle at 2. *See also* AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 76-80 (describing AT&T's inability to have local service freezes removed despite adherence to Qwest's documented processes).

[34] Eschelon at 28. *See also* AT&T at 6-8; WorldCom at 19-20 & Lichtenberg Decl. ¶¶ 76-77.

[35] AT&T at 35-38; WorldCom at 20-23; *Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 32.

responses to CLEC transactions manually, regardless of whether they are returned in automated form in actual production.[36]

SATE, Qwest's alternative test environment, is unstable, because SATE releases may differ from those actually implemented in production.[37] Moreover, SATE does not mirror the production environment. First, the responses returned to CLECs may differ from those received in actual production. Second, in contrast to their experience in actual production, CLECs using SATE must choose a "path" for the response that will determine the time within which it will be returned.[38] Third, SATE does not support many of the products that Qwest actually makes available in the production environment, and requires CLECs (like AT&T) which seek the inclusion of additional products in SATE to follow the time-consuming procedure of submitting a change request. For example, An evaluation that Hewlett-Packard conducted in connection with the third-party testing of Qwest's OSS in Arizona found that SATE Release 8.0 supported only 34 (or 47.5 percent) of the 80 products that Qwest offered. *See* Hewlett-Packard "Report 7, Products Offered in AZ," dated December 21, 2001 at 5 (attached hereto as Attachment 1). The products not supported by SATE include line splitting, loop splitting, BRI ISDN, Qwest DSL, Centrex 21, and unbundled analog DID/PBX trunk port and trunk port facility. AT&T submitted two change requests in January 2002 to add line splitting and loop splitting to SATE, but those requests still have not been implemented, even though they have been prioritized. In fact, because the priorities voted for AT&T's CRs were not sufficiently high to make the "cut" for the next scheduled SATE release (Release 11.0), they likely will not be implemented until March 2003, when SATE Release 12.0 is scheduled for implementation. Similarly, Qwest has not

[36] AT&T at 35; WorldCom at 20-21. In addition, CLECs can use the Interoperability Environment only to the extent that they submit actual production accounts. WorldCom at 21; AT&T Finnegan/Connolly/Menezes Decl. ¶ 85.

[37] AT&T at 35-36.

implemented any of the nine change requests that it submitted in early 2002 for the inclusion of additional products in SATE (and did not subsequently withdraw). Qwest has scheduled only two of those nine change requests for implementation. *See* Notarianni/Dohorty Decl. ¶¶ 767-768.

These failures of SATE to mirror actual production resulted in the issuance of two exceptions by KPMG and to KPMG's conclusion in its Final Report that Qwest did not make available a "functional test environment" to CLECs.[39] More importantly, given these deficiencies, SATE clearly does not satisfy the Commission's requirement that it "perform the same key functions" as the production environment.[40]

The state commissions conclude that SATE is adequate, but their analyses show precisely the opposite. The Colorado PUC acknowledges that (1) the test environment issue was "the 'closest call' of the whole § 271 record," (2) "the record contains little evidence of [a] fully functional, flow-through eligible SATE," and (3) the SATE issue is the "significant 'loose end' remaining in this application." CPUC at 51-52. The Iowa Utilities Board acknowledges that "Qwest apparently could not achieve a SATE that mirrored production."[41]

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[38] *Id.* at 36.

[39] *Id.;* WorldCom at 21-23.

[40] *Texas 271 Order* ¶ 138.

[41] IUB at 14. *See also* NDPSC Consultative Report at 175 (stating, only that "[t]o the extent possible," SATE mirrors the production environment and is separate from the production environment). The Colorado PUC, contrary to the Commission's admonition that the prospect of future compliance is irrelevant to the issue of a BOC's current compliance with Section 271, found SATE adequate by including a performance measurement for SATE in Qwest's Performance Assurance Plan, and promised to include an additional "PID" in the PAP once it was developed. CPUC at 51. Even the CPUC, however, acknowledged that this solution "may fall short" of the Commission's criteria. *Id.* at 51-52. The Iowa Utilities Board, by contrast, found that the deficiencies with SATE noted by KPMG "go beyond" the Commission's criteria regarding test environments, and reasoned that Qwest's documentation adequately described the differences between SATE and the production environment. IUB at 10-15. As AT&T has previously shown, however, the reasoning of the IUB is both incorrect and inadequate. AT&T at 37-38.

Qwest's recent *ex parte* letters regarding SATE provide further confirmation that SATE fails to mirror the production environment.[42] One table presented in these *ex partes* shows that SATE includes only about 78 percent of all error messages actually experienced in production (409 of 525 error messages). Even assuming that Qwest's data are correct as stated, CLECs using SATE cannot receive 22 percent of the error messages that they would actually receive in production. Furthermore, Qwest's table shows that SATE covers only 13.43 percent of the total legacy system error messages that have been encountered in production.[43] Qwest's statement that "not every possible legacy error response is duplicated in SATE" is a gross understatement.[44]

The omission of so many errors, and error messages, from SATE is flatly inconsistent with Qwest's own description of the purpose of interface testing – "to ensure CLECs that their systems will be able to receive and display error messages and other responses, such as FOCs."[45] Because so many responses are *not* coded in SATE, CLECs have no assurance that the error messages that they receive in SATE will be the same as those received in production. In fact, the examples that Qwest offers of differences in SATE responses and production responses confirm that the content of the responses can be, and are, dramatically different: (1) when a CLEC reserves an appointment longer than 8 hours, a CLEC receives a response of "you cannot reserve an appointment longer than 8 hours" in production, but a response of "no appointment available" in SATE; (2) when a CLEC attempts to retrieve a customer service record using an incorrect

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[42] *See* Qwest July 15 *ex parte*; Qwest July 19 *ex parte* at 7-10.

[43] *See* Qwest July 15 *ex parte* (table); Qwest July 19 *ex parte* at 8 and table attached thereto. Attachment 2 hereto, which is based on the table included in Qwest's *ex partes*, shows how the above-described percentages were calculated. The 22 percent figure represents the difference between the number of production legacy system errors not included in SATE (134 minus 18), divided by the combined total of 525 errors in the Business Process Layer ("BPL") and the legacy systems (391 plus 134). The 13 SATE-coded legacy system errors constitute 13.43 percent of the 134 legacy system errors.

[44] Qwest July 15 *ex parte*, "SATE Mirroring Production," at 1; Qwest July 19 *ex parte* at 7.

circuit ID number, it receives a response of "missing reference data in CRIS [because] circuit ID number not listed" in production, but a response of "no active account" in SATE; and (3) when a CLEC enters an incorrect zip code in a pre-order query, it receives a response of "no [geographic area] match for that zip code" production, but a response of "address not found" in SATE.[46] In all three of these examples, the SATE error message returned would also be returned for other encountered error conditions, and CLECs do not know which error condition has actually been encountered.

Qwest attempts to explain away these differences by asserting that the "structure," not the content, is important to CLECs, and that "what is important is whether the CLEC can receive and display the error message."[47] As Qwest knows, however, the content of the messages received in a test environment is extremely important to a CLEC. There is, for example, a significant difference between being advised that an appointment is totally unavailable, and being advised that an appointment cannot be reserved for more than 8 hours. Unless the content of the SATE message is the same as that of the message it receives in production, the CLEC has no assurance that the transaction it receives in SATE will have the same experience in commercial production – or how the CLEC should respond to Qwest's message or which actual error condition has occurred. Thus, whether a human being or the CLEC's EDI code actually acts upon the content of an error message (*see* Qwest July 19 *ex parte* at 7), the importance of the content of the message to a CLEC – and the confusion that the CLEC will experience due to the differences in the content of the messages – will be the same.[48]

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[45] July 15 *ex parte*, "SATE Mirroring Production," at 1.

[46] Qwest July 19 *ex parte* at 9; Qwest July 15 *ex parte*, "SATE Mirroring Production" at 3.

[47] Qwest July 15 *ex parte* at 3. *See also* Qwest July 19 *ex parte* at 7-8.

[48] As KPMG noted, the problems that CLECs experience as a result of the differences in the responses in SATE and those in production are not alleviated or removed because Qwest has issued documentation describing those differences. AT&T at 38. That documentation only enables CLECs to look up each response against the

Moreover, CLECs may desire to develop software of their own that analyzes the content of error codes and prompt for responses (either by its electronic systems or by CLEC representatives) error messages in actual production. As a practical matter, development of such software is impossible if the responses received in SATE differ from those in actual production. Similarly, because of the different content of SATE responses and production responses, CLECs evaluating a new version of an interface "have no way of knowing whether they will receive the same response in production and whether they should revise their systems, ask Qwest to revise its systems, or conclude that there is no need for any changes."[49] In short, the specificity and content of the message received in SATE, and the extent to which that content mirrors production, is critical to a CLEC's ability to compete.

Qwest's attempt to attach "significance" to the absence of any requests by CLECs for coding of specific additional error messages in SATE is disingenuous. July 15 *ex parte*, "SATE Mirroring Production" at 1-2. The lack of such requests is due to Qwest's insistence that any CLEC seeking the inclusion of additional error codes must file a data request form for those codes. Because of Qwest's refusal to make SATE mirror the production environment, and the fact that Qwest limits that resources available for improvements to SATE, CLECs could achieve the coding of additional error messages in SATE only by foregoing the implementation of the vast array of functionality, products, or features that are not (but should be) currently included in SATE.[50] During the Section 271 workshops conducted by the Arizona Corporation Commission, AT&T requested that Qwest code all production error messages in SATE as a matter of policy (rather than as a part of the change management process); Qwest refused to do so.

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documentation to determine whether the SATE response matches the response in production. CLECs should not be required to perform such a cumbersome, time-consuming task.

[49] WorldCom at 21; *see also* AT&T at 37-38.

[50] *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 101 n.69; WorldCom at 21-22.

B. Qwest's Interfaces Fail To Provide Nondiscriminatory Access.

The comments confirm that Qwest's interfaces do not provide CLECs with access to OSS functions that is equivalent to that which Qwest provides its retail operations.

Pre-Ordering. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects. *First*, Qwest has not provided CLECs with the ability to integrate EDI pre-ordering and ordering functions successfully. For example, even though MCI has integrated its EDI interfaces based on Qwest's documentation, Qwest still rejects more than 30 percent of MCI's orders – showing that "the only 'integration' that is possible still results in a high reject rate on basic UNE-P orders."[51]

AT&T has also encountered substantial integration difficulties.[52] Verizon and BellSouth have designed their parsed CSR so that the information in the service and equipment ("S&E") section of the CSR is based on the end-user's telephone number ("TN"). Thus, in the S&E section of these RBOCs' parsed CSRs, the telephone number is followed by the line-based features associated with the TN, including the primary interexchange carrier ("PIC") code, the local PIC ("LPIC") code, the line class code, and features. The CLEC's systems thus "know" what information follows the TN, and where the information is (since the number of digits for each entry are defined in the RBOC's parsing rules). This design enables the CLEC to locate the data and populate the local service request ("LSR"), since the LSR is also TN-oriented.

By contrast, although Qwest maintains the TN orientation for LSRs, Qwest has grouped information in the S&E section of the CSR based on the universal service ordering codes ("USOCs") for the various products and services ordered by the customer. Each USOC on Qwest's parsed CSR is followed by a string of data, but the data do not necessarily contain the

[51] WorldCom at 8.
[52] *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 124 & n.83.

telephone number associated with the USOC. CLECs using Qwest's parsed CSR must parse the data in the S&E section to determine the applicable TN as well as the line-based features associated with that particular TN. Thus, for example, a CLEC would be required first to locate all USOCs and then the TN field identifier ("FID") and then search separately for the 7-digit (or 10-digit) number that is the customer's TN, the four-digit number that constitutes the PIC associated with that TN, the digits for the intraLATA carrier PIC, the digits for the line class code, and each line-based feature. Because customers commonly order more than one feature, the parsed CSR typically contains several strings of data (one for each USOC), with each USOC containing a separate telephone reference. As a result, the time and resources that the CLEC would be required to devote to searching for the correct TN and line-based features outweigh any benefits that might be obtained from using the parsed CSR – particularly where, as in AT&T's case, the CLEC intends to offer local exchange service on a mass-market basis.

Because Qwest's illogical and cumbersome orientation of its parsed CSR precludes CLECs from using computer-based engineering to efficiently auto-populate the S&E data in to the LSR, and because Qwest has not provided adequate parsing business rules, AT&T displays pages of the data in the S&E section and provides for them to be manually populated it into the LSR. In short, Qwest's failure to use the telephone number as the reference point for the S&E section of the CSR precludes CLECs from successfully, and fully, integrating pre-ordering and ordering functions.

The inability of CLECs to integrate pre-ordering and ordering functions successfully is further confirmed by Qwest's failure in this Application to cite a single real-world CLEC that has actually done so. Based on the materials in Qwest's separate (and subsequent) 271 application for Washington and three other states, it appears likely that Qwest will cite a recent letter from New Access as evidence of actual successful integration by a CLEC.[53] The undated, three-sentence letter from New Access, however, provides no support for Qwest's claim. The letter does not describe who developed the alleged integration capability used by New Access, when New Access began to auto-populate LSRs, and the extent to which New Access auto-populates LSRs. Moreover, the claim of New Access that it uses EDI pre-ordering data to populate EDI order translations is inconsistent with Qwest's recent *ex parte* regarding the CLECs' use of its test environment, which states that ***

*** [54]

In addition to its failure to enable CLECs to integrate pre-ordering and ordering functions successfully, Qwest has failed to meet its obligation to enable CLECs to integrate pre-ordering interfaces successfully with their own back-office systems.[55] As AT&T described, CLECs using the EDI pre-ordering interface experience order rejections because the service address information in the "CRIS" database that supplies the service address information used by CLECs on migration orders frequently do not match the information in the PREMIS database used by Qwest to validate addresses. This impediment to integration appears to be unique to Qwest's

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[53] *See* Notarianni/Doherty Declaration in *Qwest II*, Exh. LN-OSS-15. Consideration of the New Access letter by the Commission in the instant proceeding would be improper. Although the letter has a fax date of June 19, 2002 (six days after Qwest filed its application), the letter itself contains no date, and Qwest did not suggest in *Qwest II* that it discovered the purported "integration" by New Access only after it filed its first application. Qwest did not advise CLECs of the New Access letter until late June, when it filed comments in the Section 271 proceedings in Arizona. Because of the eleventh-hour nature of the disclosure of the letter, CLECs have had no opportunity to conduct discovery of Qwest or New Access regarding the assertions made in the letter.

[54] *See* Qwest July 15 *ex parte* on test environment, at 4. The Commission has never previously found a letter from a single CLEC, written in highly conclusory terms, to be a sufficient basis for concluding that CLECs "have been able to successfully integrate both pre-ordering and ordering." *See, e.g., Georgia/Louisiana 271 Order* ¶ 123 (finding that four CLECs had stated that they were able to integrate successfully); *Texas 271 Order* ¶¶ 154-155 & n.417 (finding that as many as three CLECs had integrated successfully, one of which had been submitting orders for at least ten months).

[55] The Commission has stated that "in order to demonstrate compliance with checklist item 2, the BOC must enable competing carriers to transfer pre-ordering information (such as a customer's address or existing features) electronically into the carrier's own back office systems and back into the BOC's ordering interface." *Texas 271 Order* ¶ 152. *See also Georgia/Louisiana 271 Order* ¶ 119.

systems.[56] Because of the extent of order rejections resulting from these "mismatches," AT&T has found it necessary to obtain address information for migration orders by using the address validation based on telephone number ("TNAVQ") function of Qwest's GUI interface, where the address is validated using the PREMIS database.[57] However, the use of the GUI (which is not integratable with a CLEC's back-office systems) requires AT&T to enter the order twice – once into the LSR and once into AT&T's own systems – in order for AT&T to store the data in its own systems. This "double data entry" is a denial of parity, because it increases the likelihood that the CLECs will experience additional costs, delays, and human errors not experienced by Qwest's retail operations, which use fully integrated systems.[58]

Second, Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself.[59] The "loop qualification tools" that Qwest provides to CLECs suffer from "numerous and severe deficiencies."[60] Information derived from these "tools" is often inaccurate or incomplete – indicating that, in violation of this Commission's requirements, Qwest is "filtering" data from the databases to which it has access.[61] Qwest itself has admitted that, because "the Qwest Loop Qualification Tool uses a proprietary algorithm and [the] Raw Loop Data tool does not," the Raw

[56] AT&T at 40. The rejections caused by such "mismatches" do not occur in the regions served by Verizon (which has ensured that the address information in its databases are identical) and by SWBT (which has programmed its systems to process an order as long as the address information derived from the CSR is a "near-match" to the information in its database that validates address information on the LSR).

[57] AT&T cannot currently use the address validation function of the EDI pre-ordering interface, because its own systems were designed to obtain and use CSRs as the source of service address information on migration orders.

[58] *See, e.g., Second Louisiana 271 Order* ¶ 96.

[59] *See* AT&T at 38; Covad at 13-25; WorldCom at 24-25.

[60] Covad at 19-20.

[61] Covad at 19-21; WorldCom at 24-25 (describing MCI's receipt of responses which state that fiber exists in a particular loop, but fail to advise that spare facilities are available, notwithstanding Qwest's claim that its database contains information concerning spare copper facilities).

Loop Data tool might erroneously advise the CLEC that a particular loop could serve customers using the DSL offered by the CLEC. Qwest June 10 *ex parte* at 24-25 (Tab 9).[62]

Third, Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing ("MLT") before actual provisioning.[63] Qwest's refusal to do so severely impairs CLEC's opportunity to compete, because an MLT is necessary in order to verify the accuracy of the loop qualification information that Qwest provides.[64] Qwest's policy is a denial of parity, since Qwest has performed pre-order MLTs in its retail operations.[65]

Finally, the comments show that Qwest denies nondiscriminatory access to pre-ordering functions because it changes due dates for CLEC orders far more frequently than for its own retail orders. The higher rate of postponed installations results in customer dissatisfaction (blamed on the CLEC) and requires the CLECs to expend additional resources to determine the actual delivery date and to "mend damaged customer relationships."[66]

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[62] In addition to denying CLECs access to all of its systems with loop qualification information, Qwest has not offered to conduct a manual search of engineering records for CLECs – until very recently. *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 129. Although the Colorado PUC states that it has ordered the inclusion of a provision requiring such searches in Qwest's SGAT (CPUC at 19), the new provisions of the Colorado SGAT are not nearly as extensive as the provisions that Qwest has incorporated in the SGATs of the four States that are the subject of its *Qwest II* application. *Compare* Colorado SGAT § 9.2.2.8.1 *with* Notarianni/Doherty *Qwest II* Decl. ¶ 116 n.131 (quoting SGAT § 9.2.2.8.6 in the four *Qwest II* States, which – unlike the Colorado SGAT – requires Qwest to perform manual search upon CLEC request and specifies particular loop make-up information that Qwest must provide in response to such a request). The SGATs in the other four *Qwest I* States do not even provide CLECs with the protection afforded by Colorado, but instead give Qwest almost total discretion to determine what access CLECs will have to loop qualification information. *See* NDPSC Consultative Report at 132. Finally, unlike the *Qwest II* States, none of the *Qwest I* States, including Colorado, gives CLECs the right to audit Qwest's loop qualification information to ensure that they are receiving parity of access. Covad at 16.

[63] *See* AT&T at 38-39 & Finnegan/Connolly/Menezes Decl. ¶¶ 130-135; Covad at 22-24.

[64] AT&T at 38-39; Covad at 22-24.

[65] *See* Qwest July 10 *ex parte* at 26-27 (Tab 10); AT&T Finnegan/Connolly/Menezes Decl. ¶ 133; Covad at 19. Contrary to the assertions of the North Dakota PSC, Qwest did not make available all of the data from its retail pre-order MLTs to CLECs. *See* NDPSC Consultative report at 131; Covad at 19 (Qwest only populated the Raw Loop Data tool with MLT information about loop lengths, not with other data from the MLT). Furthermore, the NDPSC's assertion that a pre-order MLT would "disrupt service" is contradicted not only by Qwest's own performance of such MLTs, but by the evidence that MLTs are relatively simple and easy to perform – as reflected by Verizon's willingness to perform them for CLECs. *See* North Dakota PSC Consultative Report at 131; Covad at 23-25; AT&T Finnegan/Connolly/Menezes Decl. ¶ 135 n.94.

[66] AT&T at 40; Covad at 28-29. *See also* DOJ Eval. at 20 (noting that "due date changes on wholesale orders have exceeded the number of due date changes on retail orders," which suggests that "further analysis is warranted").

Ordering and Provisioning. The comments also confirm that Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high-rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[67] Qwest's systems, for example, reject approximately one-third of orders submitted by CLECs using the electronic Qwest interfaces – a rate that DOJ correctly describes as "high."[68] Qwest cannot simply attribute these rates to "CLEC errors." As DOJ points out, Qwest increases the likelihood of order rejections because (unlike other RBOCs) it does not offer migration by telephone number and requires CLECs to specify the features to remove, as well as those to place, on a "migration as specified" order.[69] The likelihood of rejections is further increased by the above-described failure of Qwest to enable CLECs to integrate pre-ordering and ordering functions successfully and to ensure that the address information in the CRIS and PREMIS are the same.

Qwest's total flow-through rates are also too low, and its manual processing rates too high, to give CLECs a meaningful opportunity to compete.[70] As DOJ states, "[c]learly, a large quantity of electronically submitted orders are being handled manually by Qwest." In April, the percentage of orders manually processed by Qwest ranged from 39.6 percent to 73.1 percent in the joint application states.[71] The manual processing of orders increases the likelihood of delays and errors in provisioning – a risk that is not experienced by Qwest's retail operations, which use highly automated systems.[72]

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[67] AT&T at 40-41; Covad at 39-42; Eschelon at 6; WorldCom at 10-12.
[68] AT&T at 14; DOJ Eval. at 14.
[69] *See* DOJ Eval. at 15-16; WorldCom at 9-10.
[70] AT&T at 41; Eschelon at 6; WorldCom at 10-12.
[71] DOJ Eval. at 17; AT&T at 41.
[72] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 145-146.

Furthermore, KPMG's third-party testing established that Qwest commits numerous errors in manually processing orders. As the Idaho PUC states: "The testing revealed *an unacceptably high level of human errors* in the manual processing of orders. Although Qwest implemented additional training and revised documentation to address this problem, *the problems persisted in the limited retesting conducted after the fixes were implemented.*"[73] Just two months ago KPMG continued to find errors on approximately 15 percent of the orders that it reviewed.[74] The Nebraska PSC has cited KPMG's findings of human error as a "caveat" to its recommendation of approval of Qwest's application, because "very little hard evidence exists to validate *whether this problem has truly been corrected,*" notwithstanding Qwest's claim that is has conducted additional training of its personnel.[75]

KPMG's findings should be dispositive here, because Qwest had not reported data on service order accuracy in its regular performance reports at the time of its application. Only recently did Qwest agree to report such data (and only after a recommendation by KPMG that it do so). As the DOJ states, the lack of regularly reported commercial data on the accuracy of

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[73] IPUC at 6-7 (emphasis added).

[74] AT&T at 41-42; Covad at 40; WorldCom at 12; DOJ Eval. at 21. In view of the agreement of the commenters regarding KPMG's finding, Qwest's attempt to dispute that KPMG found an error rate of 15 percent is illogical. Qwest July 10 *ex parte* at 14 (Tab 5). Moreover, Qwest's argument that the 15 percent figure is "based on a very small number of orders" is disingenuous. *Id.* As the DOJ states, KPMG recommended additional retesting to focus on the accuracy of manually processed orders, but "Qwest elected not to support a retest, so the Observation [3110] was designated 'closed/unresolved.'" DOJ Eval. at 21. Qwest's insistence on ending the KPMG test on May 28, 2002, without further retesting of such competitively critical areas of the OSS as manual errors, change management, and the test environment occurred at about the same time the issue of the effect of Qwest's secret agreements on the validity of the results of the KPMG agreements on the validity of the results of the KPMG test (including areas where KPMG found that Qwest had satisfied test criteria).

[75] *See* Application No. C-1830, *In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c)*, Nebraska PSC Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission, entered June 12, 2002, at 4 (¶ 12) (emphasis added). *See also* NPSC CMP Order at 3 (¶ 9); NPSC Comments at 7, 9.

Qwest's manual order processing "renders the record incomplete" and raises "a serious issue, particularly given the expert tester's carefully expressed concerns."[76]

In a series of *ex parte* letters since the filing of its Application, Qwest has set forth various "internal data" and arguments in an attempt to show that its error rate in manually processing CLEC orders is low. However, Qwest's data on "application date accuracy," "LSR/order mismatches," and "manually processed LSRs rejected in error" are plainly self-serving and unreliable. For example, Qwest's data on "application date accuracy" provide no meaningful indication of the overall accuracy of its manual processing.[77] Although application dates are certainly important to CLECs, the accuracy rates reported by Qwest are undoubtedly vastly overstated, because they omit any errors committed by Qwest on *other* fields of a service order, including codes (such as USOCs) that CLECs use on virtually every LSR.[78]

The "LSR/Order mismatch" rates submitted by Qwest are equally unreliable. The rates are based only on orders for a period of five calendar days – which began on the day after Qwest implemented its process for "tracking" such mismatches.[79] The "mismatch rates" reported by Qwest are also understated, because Qwest has improperly included *all* completed orders (even electronically processed orders that were not manually processed) in the denominator of its

[76] DOJ Eval. at 19, 21. *See also* AT&T Finnegan/Connolly/Menezes Decl. ¶ 161 (quoting portion of KPMG's Final Report expressing concern about the "numerous problems" that KPMG encountered during the test regarding the accuracy of manually processed orders).

[77] *See, e.g.,* Qwest July 19 *ex parte* at 16; Qwest July 18 *ex parte* at 1; Qwest July 12 *ex parte* at 1; Qwest July 10 *ex parte* at 16 (Tab 5). As Qwest's *ex partes* effectively admit, the data that Qwest originally described in its Application as "service order accuracy" rates were both inaccurate and misleading, because Qwest did not specify that the data were based only on application dates and were not limited to manually processed orders. *See* Qwest July 12 *ex parte*.

[78] *See* AT&T at 42 n.108 & Finnegan/Connolly/Menezes Decl. ¶¶ 172-173; DOJ Eval. at 22 n.97 ("Qwest's audit was limited to verifying the accuracy of the 'APP' (date) field"). Qwest itself acknowledges that the application date is only "one of several fields" that it will evaluate under the new PID (PO-20) for service order accuracy. Qwest July 19 *ex parte* at 40.

[79] *See* Qwest July 10 *ex parte* at 13 (Tab 4); DOJ Eval. at 22 n.97.

calculation.[80] And, given the time frame of its orders, Qwest cannot possibly have included in its study "all orders qualified for measurement OP-5" as it claims, since that measurement encompasses new installations that are free of trouble reports within 30 days of initial installation.[81]

Although Qwest asserts that less than 1 percent of manually processed LSRs are rejected in error, its figure represents the percentage of manual LSRs that eventually receive a firm order confirmation ("FOC") after initially being issued a rejection notice.[82] This methodology, however, includes even those orders that Qwest *properly* rejected. Under Qwest's business rules, if Qwest returns a rejection notice on a LSR for a "fatal error," and the CLEC resubmits the original LSR with the appropriate corrections (and the LSR is otherwise complete and accurate), Qwest will send a FOC to the CLEC. Because CLECs commonly receive a FOC after resubmitting an LSR in response to a rejection notice, Qwest's percentage of manual LSRs "FOC'd after reject" reveals nothing about the extent to which the rejections were erroneous.[83]

Finally, Qwest's attempts to cite the results of data reconciliation efforts by Liberty, and the results of the KPMG testing, as evidence that it has no significant manual error problems is

[80]Qwest July 10 *ex parte* at 13 (Tab 4).

[81] Qwest July 10 *ex parte* at 13 (Tab 4). Qwest contends that it analyzed "all orders from June 28 through July 3 to determine the volume of the LSR/order mismatch situations as a percentage of all orders qualified for measurement by OP-5." *Id.* In order to ensure that "all orders qualified for measurement by OP-5" were included in its analysis, however, Qwest would be required to wait until August 2 (30 days after the orders completed on July 3, which was the last day of the time period used by Qwest). Because Qwest filed its data in its *ex parte* letter of July 10 – more than three weeks prior to August 2 – its analysis could not have encompassed the universe that it describes. CLECs and their customers may not discover problems that resulted in "mismatches" (such as the failure to provision features ordered by the customer) until well after the seven-to-twelve day period that elapsed between the June 28-July 3 period used by Qwest in its analysis and the July 10 *ex parte*. For example, a customer may not attempt to use features that it ordered (such as three-way calling), or discover that the feature had not been installed, until several weeks – or even more than 30 days – after the scheduled installation date. Such a situation would not have been captured in Qwest's study (or, in some instances, in the OP-5 metric itself).

[82] *See* July 10 *ex parte* at 16-17 (Tab 5).

[83] Indeed, since Qwest's own business rules contemplate the transmission of a FOC after resubmission of an adequate LSR sent in response to a rejection notice, Qwest's calculation that less than 1 percent of LSRs receive a FOC after a rejection notice is inherently suspect.

misplaced.[84] Liberty opened a number of observations because it found Qwest's rate of human errors unacceptable, but closed them without reviewing any orders to verify whether Qwest had fixed the problems.[85] By contrast, KPMG's recent analysis of manual errors by Qwest (reflected in KPMG's Observation 3110) involved an actual review of Qwest orders generated after Qwest purportedly implemented "fixes" to correct the problems noted by Liberty.[86]

Second, like the KPMG test and Qwest's own reported performance data, the comments confirm that Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. The comments show, for example, that Qwest does not return jeopardy notices in a timely fashion, transmits jeopardy notices after Qwest initially issued a FOC but later discovered that the order was in error, and issues completion notices before provisioning has actually been completed.[87] These deficiencies put CLECs at a severe competitive disadvantage with Qwest's retail operations, which have real-time, fully automated access to order status information.

Billing. The comments demonstrate that Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") and wholesale bills to CLECs.[88] In addition to the numerous billing errors that AT&T described in its opening comments, Eschelon

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[84] *See* Qwest July 10 *ex parte* at 14-15, 17.

[85] AT&T at 47 & Finnegan Decl. ¶¶ 38-71.

[86] KPMG's findings in its test regarding provisioning accuracy lend no support to Qwest's claim that it manually processes orders accurately. KPMG's discussion of the provisioning accuracy tests does not indicate the extent to which manually processed orders (as opposed to orders that flowed through) were considered in that test. Qwest's interpretation of the KPMG test is totally inconsistent not only with the concerns that KPMG expressed in the Final Report regarding the extent of human errors committed by Qwest, but also by KPMG's finding that it was unable to determine whether Qwest defined, documented, and followed its procedures for manually processing orders that did not flow through. *See* KPMG Final Report at 149-150 (Evaluation Criterion 12.8-2). In any event, the fact that Qwest eventually passed KPMG's provisioning accuracy test – after both KPMG and Hewlett-Packard had previously found numerous provisioning errors – does not show that it can consistently provision orders accurately in the commercial environment. WorldCom Lichtenberg Decl. ¶ 42. To the contrary, the comments state that on some types of orders (such as UNE/UNE-Star), Qwest's provisioning error rate has been at least 50 percent. Eschelon at 11 & Powers Decl. ¶ 13.

[87] *See* AT&T at 43; Covad at 25-28; WorldCom at 12-15.

states that it has more than $2.2 million in outstanding disputes with Quest as a result of inaccurate charges on its bills, that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUFs do not include minutes of use for intraLATA toll traffic carried by Qwest.[89] WorldCom likewise states that it has "opened billing disputes with Qwest for hundreds of thousands of dollars."[90] The inaccuracy of Qwest's wholesale bills and DUFs is further confirmed by KPMG's third-party testing, where Qwest repeatedly transmitted erroneous wholesale bills and failed KPMG's test for DUF accuracy and completeness five separate times before it finally (and barely) passed on the sixth try.[91]

The errors in Qwest's wholesale bills described in the comments undoubtedly understate the full extent of Qwest's failure to provide accurate bills, because they are based on a limited review of the cumbersome, voluminous *paper* bills which Qwest provides to CLECs.[92] Qwest does not provide CLECs with the fully auditable bill which this Commission has required as a condition of Section 271 approval, and which the DOJ has described as an "important factor in making local telecommunications markets fully open to competition."[93] The DOJ expresses particular concern regarding the auditability of Qwest's electronic bills, finding that "Qwest's

[88] *See, e.g., New Jersey 271 Order* ¶ 121; AT&T at 44-46; Eschelon at 22-24; WorldCom at 17-19.

[89] Eschelon at 22-26.

[90] WorldCom at 18.

[91] *See* AT&T at 45-46; WorldCom at 18. In an apparent response to the evidence of its repeated failures of the DUF test during KPMG's testing, Qwest recently asserted that the first two tests were cancelled due to test bed problems, and that it passed the DUF test administered by Cap Gemini as part of the OSS test in Arizona. Qwest July 10 *ex parte* at 8-9 (Tab 3). These arguments are illogical. KPMG's Final Report clearly considered the first two tests to be valid tests. *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 219 n.154 (quoting KPMG Final Report). Even if Qwest failed the KPMG test "only" three times before it ultimately passed, that record of failures still calls the reliability of its systems into serious question. *See* AT&T at 45. That is equally true with respect to the Cap Gemini test, which Qwest passed only after two retests (each of which was smaller in scope that Cap Gemini's first test). *See* Qwest July 10 *ex parte*, Tab 3, Att. 3-A at 8-9, 11 (Cap Gemini report).

[92] *See, e.g.,* WorldCom at 18.

[93] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22; DOJ Eval. at 23 & n.102; AT&T at 19-20; WorldCom at 17-18.

application as filed does not demonstrate that it provides CLECs with electronically auditable wholesale bills for the UNE platform," and that "[I]t is unclear whether Qwest's billing system, absent reliance on BOS-BDT, satisfies the requirement of electronic auditability."[94]

Qwest's wholesale electronic bills are not auditable because they are not provided using the industry standard CABS BOS BDT format, which would permit CLECs to use computer software to audit the data. Instead, Qwest generates electronic bills using its non-industry-standard "CRIS" system in its own proprietary format, which precludes the bills from being audited with the use of currently available software.[95]

Qwest previously promised that it would implement electronic CABS BOS billing for wholesale charges on July 1, 2002.[96] That did not happen. Although the bills are now in BOS BDT format, they are still generated by Qwest's CRIS system – not by CABS. Qwest's use of CRIS precludes CLECs from designing a single system to handle and audit the CRIS bills, since Qwest's three billing centers provide CRIS bills with differing levels of detail.[97] Moreover, Qwest has advised CLECs that the new CRIS bills will not be subject to CABS BOS edits, which ensure that all fields on the bill are populated correctly.[98]

Even in the short time since its implementation, the CRIS BOS BDT bill has already proven to be flawed. When AT&T received its first three such bills during the week of July 15, AT&T was unable to load or process them, because Qwest used suffix codes that were inconsistent with industry standards for BOS electronic bills.[99] Qwest then admitted that it had

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[94] DOJ Eval. at 2, 23.

[95] *See* AT&T at 19-20; WorldCom at 17-18.

[96] AT&T at 46 n. 132; WorldCom at 17.

[97] WorldCom at 18 & Lichtenberg Decl. 68.

[98] *See* Memorandum to Bill Difference Distribution Group from Catriona Dowling (Qwest), dated July 11, 2002 (attached hereto as Attachment 3). The lack of such edits increases the likelihood that the bill will be inaccurate.

[99] BOS electronic bills are required to be formatted consistently with the Telcordia industry standards. Under those standards, the bill must begin with a 100101 (header record) and end with a 109999 (trailer record) with accurate

erred and resubmitted the three bills (for Washington, Arizona, and Colorado) with the correct codes during the week of July 22.

Even the three bills resubmitted by Qwest were seriously defective. Each resubmitted bill was out of balance (*i.e.*, the total amount listed as due on the bill was inconsistent with the sum of the individualized charges), lacked some usage records, and provided detail records for taxes that were incorrectly coded. The bills also contained misformatted details for "other charges and credits," and for adjustments, with invalid "date from" and "date through" entries. Moreover, because the three bills were not provided by the same billing center, the problems in the Washington bill (which was issued by the billing center in Qwest's Western region) were somewhat different from those in the bills for Arizona and Colorado (which were issued by the billing center for Qwest's central region).[100] This new problem has been referred to Qwest's technical group. Even if these problems are resolved, however, experience to date with the new CRIS BOS bill illustrates that it will take some time before all deficiencies in the bill have been determined and fixed.[101]

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suffix indicators in each that specify the content of subsequent billing records. The accurate population of the "record identification suffix" and "suffix record indicator" data elements on all records is very important. Qwest did not populate the suffix record indicator correctly on the last 109999 record to indicate that it was the last record fo the bill. AT&T has programmed its systems according to industry standards, and was unable to process the bill because it appeared to be incomplete.

[100] Although the usage amounts and tax amounts in all three bills were out of balance, the amounts in the Washington bill (but not the Arizona and Colorado bills) for other charges and credits were also out of balance. AT&T has not received a CRIS BOS BDT bill from the billing center in Qwest's Eastern region since July 1.

[101] *Cf.* DOJ Eval. at 23 n.106 (noting that Verizon's BOS BDT bill "encountered numerous problems with its initial deployment"). *See also Pennsylvania 271 Order* ¶ 19 (noting that nine months after Verizon first introduced its BOS BDT bill, and even after Verizon suspended such billing for four months to allow for system corrections, Verizon and the CLECs still identified "a number of problems that required correction"). As the DOJ notes, no independent testing of Qwest's CRIS BOS BDT bill was conducted prior to its implementation. DOJ Eval. at 23 n.106. Although AT&T conducted testing of the bill with Qwest during the month prior to implementation, Qwest limited the testing to a single bill file consisting of 14 usage records and 38 recurring charge records. The bill contained no records for other charges and credits, adjustments, or taxes. Because it desired more thorough testing, AT&T requested that Qwest provide a BOS BDT version of a previously issued paper bill prior to the scheduled July 1 implementation date. Qwest, however, refused to do so.

In its recent *ex parte* submissions, Qwest has asserted that its electronic CRIS bills are auditable, because they "can be loaded into publicly available software," including spreadsheet programs, "to mechanize their validation steps."[102] That is incorrect. A CLEC would be required to program the spreadsheet or database application in order to validate the correct columns and rows of the bill against the controls that it has in its own systems. Using programs such as Microsoft Excel or Lotus 1-2-3, as Qwest suggests, is unrealistic. Due to limitations on file sizes that are imposed by spreadsheet software, CLECs serving large volumes of customers would likely be unable to load their bills into such software – and, if they attempted to do so, their systems would probably "crash," with the possible loss of data. Even such programs as Microsoft Access would not be sufficient to enable a CLEC to audit a CRIS bill, because the CLEC could audit the bill only if it developed its own software to do so – a time-consuming and expensive task.[103] Although Qwest has suggested that CLECs can load the ASCII format or EDI bill in other "database programs" or "database applications" (*e.g.,* Qwest July 10 *ex parte* at 3), the fact that Qwest has not specifically identified such programs or applications (even after years of state Section 271 proceedings) confirms the lack of merit in its claim of verifiability.[104]

Even if currently-available commercial software could be used to verify the accuracy of CRIS bills (and it cannot to the best of AT&T's knowledge), Qwest's CRIS bills lack sufficient detail to permit such a verification. For example, although Qwest argues that CLECs can

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[102] Qwest June 10 *ex parte* at 3.

[103] Qwest's assertion that its CRIS bills conform to the industry standards established by Telcordia is misleading. Qwest June 10 *ex parte* at 3-4. Only Qwest's *paper* CRIS bills conform to the Telcordia standards; its *electronic* CRIS bills do not. Because of their sheer bulk, the paper bills are inauditable regardless of whether they comply with industry standards.

[104] Similarly, only in recently-filed *ex partes* did Qwest identify particular companies that provide services or offer software systems that purportedly can be used to audit CRIS bills (in EDI or ASCII Format). *See ex parte* letter from Yaron Dori (Qwest) to Marlene H. Dortch, dated July 25, 2002. The eleventh-hour nature of Qwest's identification is, by itself, reason for rejecting the credibility of its claim. Furthermore, although AT&T has had only a limited opportunity to investigate the companies identified by Qwest, the web sites of the identified

determine (through the "Summary of Service" section of the CRIS bill) whether their USOC quantities are correct, the bills do not contain summarized costs from which a CLEC could calculate the unit price for the recurring charges on the bill. As a result, the CLEC cannot determine whether the price being charged for each USOC is proper and consistent with its interconnection agreement with Qwest, or ascertain the time period for which the USOCs are being charged.[105] Moreover, the CRIS bills provide no details about the end-user's local calls, thereby preventing CLECs from verifying whether the billing amounts for end-user calls are consistent with the call details provided in the DUF.[106]

Finally, contrary to Qwest's assertion, the KPMG test does not support its claim that its bills are auditable. In the Colorado hearing from which Qwest selectively quotes KPMG's testimony, KPMG testified that it did *not* evaluate the auditability of Qwest's wholesale bills.[107]

C. The Performance Data Upon Which Qwest Relies Are Unreliable and Fail to Prove Section 271 Compliance.

The comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance, and

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companies indicate that CLECs would be required to reformat the bills into spreadsheets or other form in order to audit them (in contrast to CABS bills, which require no such reformatting).

[105] *See* Qwest June 10 *ex parte* at 2-3; AT&T Finnegan/Connolly/Menezes Decl. ¶ 235. *See also* WorldCom at 17-18 & Lichtenberg ¶ 69 (describing failure of CRIS to include details that CLECs need to audit bill, including details on USOCs, service addresses, and adjustments).

[106] AT&T Finnegan/Connolly/Menezes Decl. ¶ 235.

[107] *See* Application at Attachment 5, Appendix K, Testimony of Michael W. Weeks, Colorado PUC proceeding, Docket No. 02M-260T, June 10, 2002, at 168-169 ("Q: As we discussed last week, KPMG did not evaluate, as a part of this test, the auditability of wholesale bills? A: No. We validated the accuracy of wholesale bills delivered to the pseudo-CLEC. We did not design a test that would have developed a conclusion that says bills are auditable or not by a CLEC. . . . We didn't have test criteria targeted at measuring auditability. . . . There's no evaluation criteria for – no conclusions about auditability in the report"). Similarly, in the vendors' conference cited by Qwest, KPMG acknowledged that a CLEC could not "take a record of a call as [KPMG] did, find a DUF and then find that call detail record on the UNE-P bill." Qwest July 10 *ex parte*, Tab 1, Att. 11 at 82. During its test, KPMG used a controlled testing process that ensured that all calls made by the end-users of its pseudo-CLEC were precisely recorded so that each such call could be verified. Unlike KPMG, however, a CLEC does not have the ability to control the number, types, durations, or frequency of calls made by or to its end-users. Only if the CLEC had such an ability could it audit the type of review suggested in the KPMG testimony cited by Qwest. *Id.*, Att. 11 at 81-82.

that even Qwest's inadequate data show that Qwest is not satisfying its statutory obligations.[108] The State commissions simply ignore this evidence or rely on Qwest's promises to take remedial steps and speculation that the performance enforcement plans will somehow compel Qwest to improve its performance. That is plainly impermissible.[109] Moreover, the inherent unreliability of Qwest's performance data, coupled with the structural defects in the performance remedy plans, preclude them from serving their intended purpose.[110]

1. The Audits and Reconciliation Do Not Prove Qwest's Data Are Accurate.

Qwest cannot reasonably rely on the Liberty Performance Measurement Audit, the Liberty data reconciliation process, the KPMG data reconciliation process, or the Cap Gemini Ernst & Young ("CGE&Y") Performance Measurement Audit as proof that its performance data are accurate. The Liberty and CGE&Y performance measurement audits were not designed to and did not test the accuracy of Qwest's raw data inputs.[111] As a consequence, those audits cannot rationally be characterized as proof of the accuracy of Qwest's performance data.

Moreover, the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope.[112] Remarkably, even the flawed Liberty data reconciliation process

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[108] Covad at 4, 31-34, 36-45; WorldCom at 9-11; 16-17; Eschelon at 3-4; Finnegan Decl. ¶¶17-203; Touch America at 9.

[109] *New York 271 Order* ¶37.

[110] *See, e.g.,* IPUC at 6 (conceding that KPMG's OSS testing uncovered excessive rates of human error in the manual processing of orders, but noting that these issues will be addressed through "additional reporting and monitoring" and the six month review of the performance assurance plan); CPUC at 38-39 (conceding that Qwest OSS received an "unable to determine" rating with respect to certain test criteria raising issues of human errors, but noting that "Qwest will have incentives to reduce any human error problems" since it has agreed to develop a measure on service order accuracy), *id.* at 44-45 (noting that even where the OSS test revealed that Qwest failed the performance standard, the "COPUC is convinced that the deviation is either trivial for competitive purposes, or more importantly, can be addressed on a going forward basis by enforcement through the CPAP").

[111] Finnegan Decl. ¶¶18-26, 99-105.

[112] Finnegan Decl. ¶¶27-35.

revealed substantial problems regarding the integrity of Qwest's data,[113] and Liberty closed observations without verifying that Qwest's proposed fixes actually eliminated the errors that Liberty uncovered in Qwest's data. Liberty reviewed Qwest's training materials, but "never confirmed whether the training took place or if it was efficacious."[114] Similarly, in a number of instances, Liberty closed observations before verifying that code fixes or other corrective measures successfully eliminated other errors in Qwest's performance reporting processes.[115]

Undaunted by the evidence, the Iowa, Colorado, North Dakota and Nebraska state regulatory commissions accept at face value Liberty's ultimate finding that Qwest's data are accurate.[116] The Idaho PUC, on the other hand, admits that the Liberty data reconciliation process (as well as the KPMG test) uncovered deficiencies in Qwest's performance data. Conceding that the Liberty data reconciliation process revealed discrepancies in the close out codes used by Qwest technicians in determining the source of a particular trouble, the Idaho PUC states that this issue "is of particular concern as it may have a significant impact on the inclusion of individual repair records in Qwest's performance reports, and the exclusion of just a few records could have a significant impact on payments made to CLECs under the QPAP." Idaho PUC at 10. The Idaho PUC also admits that, because of these errors, "Qwest's real performance in repairing CLEC" facilities could be masked. *Id.* And the Idaho PUC recognizes that KPMG's test also "revealed inconsistencies in the orders entered in repair reports by Qwest technicians or other personnel," and that these types of "errors may result in improper treatment of individual repair records in Qwest's performance reports." Idaho PUC at 10. As the Idaho PUC explains:

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[113] Finnegan Decl. ¶¶38-77; Covad at 45.

[114] Covad at 45. *See also* Finnegan Decl. ¶¶40-41.

[115] Covad at 44-45. *See also* Finnegan Decl. ¶¶38-77.

[116] IUB at 17 (noting that "the IUB accepted the reports filed by Liberty as adequate without requiring a separate data reconciliation of Iowa data" (footnote omitted); NDPSC at 7 (concluding that Qwest's data are accurate based

> The continued reliability of Qwest's performance reports is a significant concern, and one the IPUC expects to monitor closely. The inability of the Liberty data reconciliation efforts to fully explain a significant percentage of the discrepancies between Qwest's data and that of participating CLECs support that concern.

Idaho PUC at 8.

Although the Idaho PUC acknowledges that the accuracy of Qwest's data "is a significant concern," it, nonetheless, concludes that the audit provisions in the QPAP will serve as an effective tool in assessing the reliability of Qwest's data in the future. Idaho PUC at 8. But the Commission has emphasized that, when an incumbent local exchange carrier files a Section 271 Application, it is expected that the carrier "is already in full compliance with the requirements of Section 271 and submits with its Application sufficient factual evidence to support such compliance." *Michigan 271 Order*, ¶55. The audit provisions in the QPAP, designed to ensure *future* compliance cannot substitute for the required showing by Qwest that it is *presently* satisfying its Section 271 obligations. It would be flatly unlawful for the Commission, as Qwest urges, to conflate the purpose of an anti-backsliding plan designed to assure *future* statutory compliance and the required demonstration of *present* statutory compliance.[117]

Qwest cannot bridge the data accuracy gap with the KPMG OSS test. Even the Idaho PUC concedes that KPMG's OSS "testing revealed an unacceptably high level of human error in the manual processing of orders," and that "the problems persisted" after retesting.[118] Similarly, the Nebraska PSC admits that there is insufficient evidence "to validate whether this problem has

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on the Liberty data reconciliation process); NPSC at 5 (noting Qwest's data are accurate based on the Liberty study); CPUC at 41 ("relying on Liberty, the COPUC submits that Qwest's performance data and results are accurate").

[117] Commissioner Wefald of the NDPSC admits that it has a staff of only "4 ½ people" who are responsible for telecommunications and other issues. Concurring Opinion Commissioner Susan E. Wefald, July 1, 2002. Commission Wefald also concedes that "[t]he North Dakota legislature has not yet passed legislation that will set up the funding the NDPSC needs to monitor Qwest's performance in the future to prevent backsliding." *Id.*

[118] Idaho PUC at 6. Qwest contends that Liberty's analysis of approximately 10,000 orders and trouble tickets during the data reconciliation process somehow renders KPMG's findings of excessive human errors meaningless. However, as noted, Liberty's data reconciliation process is fundamentally flawed because Liberty failed to confirm

been corrected."[119] Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data.

2. Qwest's Performance Metrics Are Incomplete And Flawed.

Qwest's performance results are also unreliable because they omit important metrics, including service order accuracy. As DOJ recognizes, the lack of commercial performance data on the accuracy of Qwest's manually-processed orders is a "serious issue," particularly in view of KPMG's stated concerns regarding errors in Qwest's data. DOJ at 21.

Furthermore, Qwest's "New Build Policy" – which rejects CLEC orders in 30 days or less "for lack of facilities while Qwest's retail customers are allowed to wait for facilities to become available" – discriminates against CLECs and has "the perverse effect of masking in Qwest's performance reports its delays in filling competitors' orders, because competitors' rejected and 'held' orders are excluded from" performance results.[120] Qwest's exclusion of such orders from its performance results necessarily means that its reported rejection notice intervals are understated, and that its ordering and provisioning results are inaccurate.[121]

3. Qwest's Own Data Do Not Demonstrate Statutory Compliance.

Even Qwest's inadequate and unreliable data show that it has not satisfied its checklist obligations. Qwest's rejection rates are unacceptably high by any commercial standard.[122] The comments confirm that Qwest's total flow through rates are inadequate and that it relies

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that Qwest's purported corrective measure actually eliminated or reduced the rate of human error to acceptable levels. *See* Finnegan Decl. ¶¶38-77.

[119] *See* Nebraska PSC Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission, entered June 12, 2002 at 4.

[120] Covad at 4. *See also* Finnegan Decl. ¶¶ 116-126; Wilson Decl. ¶¶ 42-45.

[121] Covad at 4; Finnegan Decl. ¶¶ 116-126.

[122] WorldCom Lichtenberg Decl. ¶¶28-30.

excessively on manual processing which increases the risk of provisioning error and delay.[123] Qwest also does not provide timely, accurate and complete status notices.[124]

Similarly, Qwest does not provision CLEC orders at parity. Thus, for example, Qwest has failed to meet the parity standard for installation of UNE-P POTS and UNE-P Centrex orders.[125] The comments also confirm that Qwest does not perform at parity in the area of maintenance and repair,[126] and that Qwest's repeat repair trouble report rates for CLEC orders are higher than those for retail orders.[127]

In its July 19 *ex parte*, Qwest attempts to explain away its own performance results showing a lack of parity in the MR-8 measure for UNE-P Centrex orders in Iowa. Pointing to a "structural anomaly in the PID associated with disaggregation as to retail analogue level," Qwest contends that it is not appropriate to compare its wholesale UNE-P Centrex performance to retail Centrex performance because: (1) retail Centrex is used exclusively for business orders, while UNE-P Centrex "is used 38% of the time to serve residential premises;" (2) trouble report rates for residential orders are higher than those for business orders; and (3) because Qwest's retail Centrex product is based on 100 pair terminal block increments and portions thereof are used by CLECs, "the terminations in the terminal block [are] susceptible to repair trouble due to frequent technician access."[128] Qwest's contentions cannot withstand analysis.

Qwest cannot legitimately contend that its performance failures under the MR-8 measure for UNE-P Centrex orders reflect higher trouble report rates for residential customers. Residential customers have a higher repair rates because of *inside wiring* problems. And

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[123] *See, e.g.,* Covad at 39-40; WorldCom at 10; WorldCom Lichtenberg Decl. ¶¶37-42.
[124] Finnegan/Connolly/Menezes Decl. ¶¶175-189; Covad at 25-28; WorldCom at 12-15.
[125] Touch America at 9; WorldCom at iii; WorldCom Lichtenberg Decl. ¶¶57-62; Finnegan Decl. ¶¶187-188, 197.
[126] Touch America at 9.
[127] *See*, *e.g.*, WorldCom Lichtenberg Decl. ¶66; Finnegan Decl. ¶¶200-201.

troubles attributable to inside wiring cannot skew MR-8 performance results, because the measure already excludes troubles coded to customer premises equipment.[129] Similarly, UNE-P Centrex orders are susceptible to higher trouble rates because of frequent technician access to the common terminal block, but the work that Qwest performs to install UNE-P Centrex is the same whether the end-user is a business or residential customer. Most important, no physical work activity is required to place a residential customer on Centrex; the customer's phone number is simply moved into the Centrex common block *via* the switch software.[130]

III. THE COMMENTS CONFIRM THAT QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

Qwest began reducing its inflated rates in Colorado only months ago. And Qwest unilaterally lowered its rates in the other four states only *days* before filing the joint application. In every state except Colorado, Qwest's rate reductions are temporary and are expressly subject to change. Simply put, Qwest has offered this Commission no assurances that CLECs will continue to have access to the new rates implemented by Qwest once Qwest has obtained Section 271 approval.

The Commission cannot rationally rely on the state commissions to ensure that Qwest's recurring and non-recurring rates will be set at cost-based levels in future rate proceedings. In

[128] July 19 *ex parte,* attachment at 30.

[129] Qwest Appendix D, Attachment 5, ROC 271 working PID Version 4.0, MR-8.

[130] Assuming *arguendo* that technician access to the terminal block is a factor in trouble report results as Qwest suggests, then Qwest's performance results showing parity under the MR-8 measure for UNE-P POTS and business and residential resale are highly suspect. The vast majority of CLEC UNE-P POTS orders do not require a dispatch and simply involve a billing change when a customer migrates from Qwest to a CLEC. In sharp contrast, a higher percentage of Qwest installations require an outside dispatch or a dispatch inside the central office. To the extent that Qwest's MR-8 results for UNE-P POTS, business and residential resale orders show parity, the performance results could reflect that a larger percentage of CLEC orders required no physical work activity. If Qwest's theory regarding the purported impact of technician access on trouble repair rates is true, then the standard for MR-8 UNE-P POTS and business and residential resale should be changed as well. Additionally, if Qwest's theory is taken to its logical conclusion, Qwest's parity results under MR-8 for UNE-P POTS and business and residential resale orders in its Application should not be accepted at face value.

the more than six years since the Act was passed, these states have *never* established TELRIC-compliant rates. The UNE rates adopted by the Iowa commission, for example, were found to violate the 1996 Act by a federal court because the Iowa state commission *openly refused* to apply TELRIC principles. The Idaho state commission conceded that the UNE rates relied upon by Qwest – which were initially adopted in 1997 using 1996 data – are so stale that there could be no finding that they are TELRIC-compliant. The Nebraska state commission simply split the baby and set UNE rates using the discredited Benchmark Cost Proxy Model and severely flawed inputs that reflected Qwest's "actual" costs. The North Dakota state commission, which last adjudicated the UNE prices in 1997, established only "interim" rates subject to true-up upon the completion of a subsequent proceeding, which has never taken place. And although the Colorado commission did conduct more thorough rate proceedings, it ultimately adopted rates based on non-TELRIC inputs. On this record, there can be no legitimate finding that these state commissions have established or will establish cost-based rates.

Even if the Commission were willing to accept Qwest's claim that its last minute rate reductions will not be undone once Qwest obtains interLATA authority, Qwest's application must be denied. Qwest has made no serious attempt to defend the rates in Idaho, Iowa, Nebraska and North Dakota on the merits. Qwest instead relies on a benchmarking analysis to demonstrate that the rates in those states are cost-based. But, after CLECs pointed out that Qwest's rates in those states do not, in fact, pass the Commission's benchmarking analysis, Qwest frankly conceded that it made a fundamental error in its benchmarking analysis for Iowa, Nebraska and North Dakota and that its rates do not, in fact, satisfy the Commission's benchmarking analysis.[131] In apparent recognition that this concession is fatal to its application, Qwest has

[131] *See Qwest July 22 Ex Parte Letter* at 1.

reached for yet another placebo: a small rate reduction in two of the states "within the next week or two."[132]

But even after those rate reductions to account for the fact that Qwest's initial analysis failed to account for sold exchanges, Qwest's rates will still flunk the Commission's benchmarking analysis, because Qwest also failed to account for numerous loop rates (including OSS, and cross-connect rates) and used improper minutes of use assumptions in its switching rate comparisons. Accordingly, Qwest must defend the Iowa, Idaho, Nebraska and North Dakota rates on their own merits. And such an analysis confirms that those rates are not the product of any rational application of the Commission's TELRIC rules. Moreover, even if Qwest's rates in the other four states did compare favorably to Colorado, Qwest still could not meet its checklist item 2 burden, because the record confirms that Qwest's Colorado recurring switching and loop rates, and its non-recurring rates, are vastly overstated by numerous clear TELRIC errors.

In addition, as demonstrated by AT&T and WorldCom, there is separate and independent evidence that Qwest's rates in Idaho, Iowa and North Dakota violate Checklist Item 2. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – the total revenues available to new entrants in Idaho, Iowa and North Dakota are not sufficient to cover an efficient new entrant's costs in those states. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[133]

[132] *Id.*

[133] The fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest.

A. Qwest's Iowa, Nebraska and North Dakota UNE Rates Cannot Be Justified On A Benchmarking Theory.

Unable to defend its Idaho, Iowa, North Dakota and Nebraska rates on the merits, Qwest claims that it "adjusted its core UNE rates in Idaho, Iowa, Nebraska and North Dakota in a manner designed to comply with the Commission's benchmarking analysis, using Colorado as the benchmark state."[134] Qwest's unilateral rate reductions are not, in fact, sufficient to support a "benchmarking" finding of TELRIC-compliance.[135] Rather, even after accounting for Qwest's unilateral rate reductions, Qwest's rates in Iowa, North Dakota and Nebraska are substantially higher than those in Colorado, on a cost adjusted basis.[136].

Loop Benchmarking. Qwest now concedes that its Iowa, Nebraska and North Dakota loop rates do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.[137] Qwest's proposes a post-reply fix of further rate reductions – to account for the fact that Qwest's initial analysis reflected the costs of exchanges that Qwest did not own – but it is far too late in the process for that approach; rather, Qwest should be required to withdraw its application and refile after it has implemented TELRIC-compliant rates.[138]

Furthermore, even if Qwest properly accounts for its sale of certain rural exchanges, Qwest's loop rates still would fail the Commission's benchmarking analysis. Qwest's recurring

[134] Application at 163.

[135] *See* DOJ Eval. at 32; WorldCom at 32-34; AT&T at 52-55.

[136] *See id.*

[137] *See Qwest July 22 Ex Parte Letter* at 1 ("Qwest has re-examined the version of the model it used and confirmed that, as WorldCom and AT&T point out, certain exchanges in Idaho, Iowa and North Dakota that Qwest has sold were erroneously included in the benchmark analysis that Qwest used to derive the rates set forth in the application").

[138] The Commission has, on occasion, waived the complete when filed rule in very limited circumstances, *i.e.,* where an applicant implemented very limited rate reductions to only a handful of rates after filing the initial application. Here, Qwest is proposing to implement numerous last minute rate changes. Moreover, given Qwest's track record of decreasing one set of rates while increasing another set of rates (or even adding new rate elements),[138] parties will be forced to evaluate not only the rates that Qwest purports to reduce, but to evaluate *all rates* to ensure that Qwest has not attempted to recover the purported rate reductions through other rate elements. Thus, the Commission should fully enforce its complete when filed rule by, at a minimum, restarting the 90-day period for Qwest's application.

loop rates, as indicated by Qwest's SGAT, include OSS, cross-connect and grooming charges that are not reflected in Qwest's benchmarking analysis.[139] Accounting for these rate elements in the benchmarking analysis shows that Qwest's rates in Iowa, Idaho and North Dakota are still higher, on a cost adjusted basis, than those in Colorado.

Qwest does not deny that it failed to reflect these significant costs in its benchmarking analysis. Instead, Qwest argues that these rate elements should be ignored. Qwest notes that the Commission has in the past found that daily usage feeds ("DUF") rates should not be included in switching benchmark analysis, and claims that this justifies Qwest's failure to account for recurring OSS, cross-connect and grooming charges.[140] Qwest is wrong. DUF records are not part of the network functionality (DUF records are generally used only for billing and record-keeping purposes); OSS, cross-connects and grooming, in contrast, are network functionalities that must be purchased to obtain a working loop. Thus, there is no question that those rate elements must be included in any valid benchmarking analysis.

Qwest's argument to the contrary is nothing less than a continuation of the anticompetitive recurring and nonrecurring charge shell game that began when Qwest first reduced its rates on the eve of this joint application. As AT&T explained (at 52-53), Qwest's reduced loop and switching rates were accompanied by *increases* in other rate elements, as well as the addition of new rate elements. Qwest is now arguing that the Commission should ignore the rate elements that it increased and focus solely on rates that it decreased. The Commission should not – and cannot consistent with the 1996 Act and the requirement of reasoned decision making – allow Qwest to game the Commission's benchmarking short cut. To the extent that the Commission allows Qwest to avoid scrutiny of its rates in Idaho, Iowa, Nebraska and North

[139] *See* DOJ Eval. at n.155; AT&T at 53.
[140] *See Qwest July 22 Ex Parte Letter* at 7.

Dakota by benchmarking those rates against Colorado rates, the Commission must insist that Qwest account for *all* loop-related elements, and not just those that Qwest has reduced in order to gain Section 271 approval.

Qwest also argues that the Commission should exclude the recurring OSS rate from the benchmark analysis because, according to Qwest, the OSS rate is a non-recurring charge, not a recurring charge.[141] This assertion is flatly contradicted by Qwest's SGAT, which expressly lists the OSS rate as a *recurring rate element*, not as a non-recurring rate element. And even if Qwest files another eleventh hour SGAT amendment to re-label the OSS rate as a non-recurring rate, Qwest bears the burden of proving that this OSS charge is, in fact, a one-time expense and that the new NRC is TELRIC-compliant. Moreover, Qwest must explain why such NRCs are appropriate in some of its states, but not in others.

Qwest also claims that its recurring grooming rates should be excluded from the benchmarking analysis because those charges are difficult to measure. That is nonsense. Benchmarking is a privilege, not a right. If Qwest believes that accounting for all relevant charges in a benchmarking analysis is too difficult, then it must eschew the benchmarking short cut and defend the non-Colorado rates on their merits. In any event, it is not, in reality, difficult to measure those costs. In Colorado, grooming rates apply only to lines served by integrated digital loop carrier, and AT&T's benchmarking analysis accounted for that fact by computing the total grooming charges that would apply based on the number of lines currently served by integrated digital loop carrier in Qwest's network.[142] In Nebraska and North Dakota, grooming

[141] *See id*. Qwest does not dispute that the grooming and cross-connect charges are recurring rates.
[142] *See* Lieberman Decl. ¶ 14.

rates apply to all lines, and AT&T computed grooming rates accordingly.[143] Thus, AT&T's analysis accounts for the fact that the application of grooming rates vary from state-to-state.

Correcting for all of these errors in Qwest's analysis confirms that Qwest's loop rates in Iowa, North Dakota and Nebraska are higher than those in Colorado on a cost-adjusted basis, by 12%, 31% and 13%, respectively.[144] And Qwest's UNE-L loop rates in those states exceed Colorado's UNE-L loop rates on a cost-adjusted basis by 9%, 35%, and 17%, respectively.[145] Thus, contrary to Qwest's claims, its UNE loop rates in Iowa, Nebraska and South Dakota do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

Non-Loop Benchmarking. Qwest's non-loop rates in Iowa, Nebraska and North Dakota also fail the Commission's benchmarking analysis, because Qwest's comparisons improperly rely upon national average "minutes of use" that do not reflect the relevant actual minutes of use for each state.[146] Because Qwest's non-loop benchmarking analysis starts with the "wrong" number of minutes – which even Qwest concedes drives the results of its benchmarking analysis – Qwest's analysis ends with the wrong benchmark results.[147]

State-specific minutes of use are publicly available from Qwest's ARMIS reports.[148] Qwest points out that benchmarking comparisons require that the ARMIS data be divided between interoffice and intraoffice minutes, and notes that the state-specific data showing the proper allocation of those minutes has not been made publicly available by Qwest.[149] Because AT&T and WorldCom do not have access to Qwest's state-specific interoffice vs. intraoffice

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[143] *See id*.
[144] *See* Lieberman Decl. ¶ 13.
[145] *See id.*
[146] *See* DOJ Eval. at 32; WorldCom at 32-34; AT&T at 52-55.
[147] *See* WorldCom at 32-34; AT&T at 52-55.
[148] Lieberman Reply Decl. ¶ 17.
[149] *See Qwest July 22 Ex Parte Letter* at 3.

minutes of use allocations, Qwest contends that their benchmarking analyses – which use state-specific total minutes and estimated state specific intraoffice/interoffice allocations – are imperfect. The Commission has no choice in these circumstances, Qwest concludes, but to rely upon Qwest's national average-based comparisons. That argument makes no sense.

It is *Qwest's* burden to establish that its rates in the other states compare favorably to its benchmark state on a cost-adjusted basis. If Qwest chooses not to supply the Commission and the parties with the allocation data that it possesses, then it cannot take advantage of the benchmarking shortcut. And if benchmarking is to be done in the face of Qwest's refusal to provide the actual allocation data, reasoned decision making and the Commission's own decisions require that it be done on the basis of the best available state-specific information.

As the Commission has explained, "UNE rates are set by state commissions based on state-specific costs divided by total demand. The UNE rates therefore necessarily reflect state-specific MOU and traffic assumptions. Use of state-specific MOU per-line and traffic assumptions to develop per-line per-month UNE-platform prices for a benchmark state and an applicant states is therefore consistent with the manner in which states establish the UNE-Platform rates."[150] These Commission findings unambiguously confirm that the use of state-specific minutes of use produce far more accurate benchmarking results than to national average minutes. The Commission's benchmarking analysis is supposed to be an objective short cut test to assess whether an applicant state's rates fall within a reasonable range of TELRIC-compliance. To allow applicants to pick-and-choose the minutes of use on which to pin their applications – which can greatly affect that analysis – would allow applicants to game the system, and would make a mockery of the entire Section 271 applications process.

[150] *See New Jersey 271 Order* ¶ 53.

The fact that Qwest has not made its state-specific interoffice/intraoffice allocations available for the purposes of conducting a fully state-specific benchmarking analysis certainly does not mean that a better approach is to abandon *all* state-specific minutes of use data, and base the benchmarking approach on national minutes of use assumptions and national interoffice/intraoffice minutes allocations that are necessarily wrong.[151] On the contrary, to the extent that non-state-specific assumptions are necessary under either approach, common sense and basic mathematics dictate which a benchmarking analysis which starts with state-specific total minutes of use would more accurately reflect relative costs than an analysis that relies on *neither* state-specific total minutes, nor state-specific interoffice/intraoffice allocations.[152]

Qwest attempts to justify its use of national average minutes in its benchmarking analysis on the grounds that in some cases, the national average minutes data produce greater state-to-state cost-adjusted rate differences than would be produced by the state-specific data, and in other cases the national average minutes data produce lower state-to-state cost-adjusted rate differences than produced by the state-specific data.[153] Qwest also points out that the relative difference in the national average and state-specific benchmarking analysis may vary from year to year (because the total number of minutes varies from year to year).[154] But that is precisely why the more accurate state-specific data must be used – it would be entirely arbitrary to endorse Qwest's position that an RBOC can choose whichever data is most beneficial with respect to the particular states and at the particular times that the RBOC chooses to file applications.[155] And

[151] *See* Lieberman Reply Decl. ¶ 20.

[152] *See id.* Qwest also claims that the fact that AT&T's and WorldCom's benchmarking analysis fails to reflect state-specific allocations of minutes between originating and terminating calls, and between calls to an access tandem and calls direct to a POP. As explained in that attached declaration of Michael Lieberman, those allocations have little, if any, impact on the results of the benchmark analysis. *See* Lieberman Reply Decl., n.1.

[153] *See Qwest July 22 Ex Parte Letter* at 3-5.

[154] *See id.*

[155] *See* Lieberman Reply Decl. ¶ 21-22.

Qwest has clearly employed such gamesmanship here. Using state-specific minutes-of-use, and state-specific estimates for the allocation of those minutes shows that Qwest's Iowa, Nebraska and North Dakota non-loop rates fail the Commission's benchmarking analysis.[156] On the other hand, Qwest's flawed non-loop benchmarking analysis – which is based on national minutes – produces a distinctly more favorable results for Qwest.

Qwest's false claim that the use of national average minutes to conduct a benchmarking analysis does not benefit Qwest also is irrelevant (in addition to being patently false). The purpose of the Commission's benchmarking analysis is to determine whether rates in a particular state are within some reasonable range of the rates in another state. The proper methodology for conducting that analysis does not depend on whether one methodology systematically produces higher or lower results than a competing methodology. Rather, the proper methodology is that which systematically produces the most accurate results. And as explained by AT&T and WorldCom, and as recognized by this Commission in the *New Jersey 271 Order* (¶ 53), the most accurate benchmarking analysis is that which is based on state-specific minutes, and if necessary state-specific assumptions relating to the allocation of those minutes.[157]

The bottom line is this: a properly conducted benchmarking analysis – using state-specific total minutes and best estimates of how those minutes are allocated – confirms that Qwest's switching rates in Iowa, Nebraska and North Dakota fail the Commission's benchmarking analysis. Qwest's non-loop rates in those states exceed those in Colorado by 4%, 48%, and 12%, respectively.[158] Thus, contrary to Qwest's claims, its UNE rates in those states do not satisfy the Commission's benchmarking analysis.

[156] *See* Lieberman Reply Decl. ¶ 23.
[157] *See* Lieberman Reply Decl. ¶ 22.
[158] *See id.* ¶ 23.

B. Qwest Has Failed To Satisfy Its Burden Of Proving That Its Colorado UNE Rates Are TELRIC-Compliant.

The record in this proceeding also confirms that Qwest's Colorado non-recurring and recurring charges – which also are the foundation of its benchmarking analysis for the other four applicant states – are not remotely TELRIC-compliant.

Colorado Non-Recurring Rates. The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.[159] The record confirms that Qwest's Colorado NRCs – which are based on Qwest's non-recurring cost model – are inflated by numerous clear TELRIC errors.[160] The reason that Qwest's NRCs are so overstated is that Qwest's non-recurring cost model is infected with several clear TELRIC errors. These errors include: (1) the improper recovery of disconnect costs at the time when a loop is initially provisioned; (2) recovery of costs for manual work activities that would be performed electronically in a forward-looking network;[161] (3) recovery of costs for activities that are unnecessary in a forward-looking network; (4) recovery of nonrecurring costs that should be recovered through recurring rates; and (5) reliance on improperly computed time estimates for various work activities.[162]

As one example, Qwest's hot cut rates are vastly inflated above cost-based levels. Qwest's Colorado SGAT reflects two separate hot cut charges. One is described as a "coordinated cut-over" and costs about $60. The other is described as a "coordinated cut-over

[159] *See, e.g., AT&T Communications,* 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

[160] *See* DOJ Eval at n.156; AT&T at 59-69.

[161] In this regard, AT&T explained that, among other problems, Qwest's NRCs are based on understated OSS flow through rates, thereby resulting in overstated manual order processing. Attached hereto (as Attachment 4) is an attachment to the testimony of Qwest witness Robert Brigham showing that Qwest experiences an OSS flow through rate of 94% to 96%.

with testing" and costs about $170. As demonstrated by AT&T, correcting the clear TELRIC errors in Qwest's cost study shows that neither hot cut rate should exceed about $13.[163] And based on AT&T's fully TELRIC-compliant Colorado non-recurring cost study, Qwest's hot cut rate should not exceed $2.08.[164]

The fact that Qwest's hot cut rates are overstated is confirmed by comparing those rates to the hot cut rates in other states where hot cut rates have been litigated, and that have obtained Section 271 approval. In New Jersey and New York – both states where hot cut rates were litigated and where the state commissions recently concluded UNE rate proceedings – the hot cut rate is $35. By contrast, as noted above, Qwest's hot cut rate is at least nearly double that amount, and as much as nearly five times higher than that rate.[165]

Qwest also provides some state-to-state comparisons of its Colorado hot cut rates. But Qwest focuses only on its $60 hot cut rate, and compares that rate only to states where hot cut rates have *not* recently been litigated. This distinction is important. As the Commission is well-aware, UNE rate proceedings are mammoth undertakings. Accordingly, CLECs focus their efforts in those proceeding on areas that will most affect their business plans. Until recently, AT&T and other CLECs did not view residential UNE-L entry as a feasible entry plan, and did not, therefore, have incentive to focus litigation resources on issues relating to that type of entry, *e.g.,* hot cut rates. More recently, however, some CLECs (including AT&T) have determined

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[162] *See* Weiss Decl. ¶¶ 10-36.

[163] *See id*.

[164] *See id.*

[165] According to Qwest, its $60 hot cut rate provides the same set of services that are provided in other states that have only one hot cut rate. It is not clear that Qwest is correct. Other states, like New Jersey and New York, do in fact provide hot cuts with "testing." However, it is unclear from a comparison Verizon's cost studies to those of Qwest's that the testing and other activities that Verizon performs for hot cuts are exactly the same as the testing and other activities that Qwest provides. In particular, Qwest's and Verizon's cost studies use different work groups, different descriptions for activities, and rely on different assumptions regarding the amount of work-time associate with each activity. The same problems exist when attempting to compare Qwest's Colorado hot cut rates to those in Southwestern Bell and BellSouth territories.

that in some areas residential UNE-L may be a feasible entry strategy. Accordingly, CLECs have begun focusing more litigation resources on ensuring that UNE-L related entry rate elements were priced at cost-based levels. Two of the states where CLECs have focused litigation resources on BOC hot cut rates are New Jersey and New York. In New Jersey, for example, CLECs pointed out that Verizon's $160 hot cut charge was vastly overstated, and because of that charge, Verizon was forced to withdraw its New Jersey Section 271 application and resubmit that application after reducing the hot cut charge to $35. Thus, there is no question, that comparing Qwest's hot cut NRCs to those in New York and New Jersey is far superior to comparison of Qwest's hot cut NRCs to those in states where the hot cut rate has not recently been litigated.

Qwest's "basic loop installation" NRC of $55.27 is also vastly overstated. The record confirms that adjusting Qwest's cost studies to correct for the myriad TELRIC errors that inflate almost all of Qwest's NRCs results in a basic loop installation NRC of $8.00.[166] And a truly TELRIC-compliant basic loop install NRC in Colorado – as measured by AT&T's Colorado non-recurring cost study – is approximately $0.29.[167]

One factor that substantially inflates Qwest's basic loop installation NRC is Qwest's imposition of inflated "disconnect" charges at the time of installation; in effect, Qwest charges CLECs (at an inflated rate) for losing customers even before the CLEC begins serving new customers. For example, Qwest has explained that it often does not fully disconnect a line when service is terminated; rather Qwest leaves the line connected to its network using a method called a "soft dial tone" (which is equivalent to a "warm dial tone").[168] This type of disconnect requires

[166] *See* Weiss Decl. ¶ 42.
[167] *See Id.* ¶ 43.
[168] *See Qwest July 22 Ex Parte Letter* at 12.

far fewer activities – and hence costs – than a full disconnect. Yet Qwest's basic loop install NRC (which reflects disconnect costs) shows no adjustment to account for those costs.[169] In addition, installation of a "warm dial tone" line would be less expensive than a completely disconnected line, yet Qwest's basic loop installation does not reflect a reduction to account for the fact that many of Qwest's lines are "warm dial tone" lines.[170]

Colorado Recurring Charges. The record confirms that Qwest's Colorado recurring loop rates are inflated by several clear TELRIC errors. The Colorado PUC correctly adopted the HAI Model to compute loop rates. However, the Colorado PUC adopted Qwest-proposed inputs that plainly are not TELRIC compliant and that substantially inflate Qwest's Colorado UNE loop rates above TELRIC levels.[171] AT&T explained in its opening comments and attached declarations the many TELRIC errors that inflate Qwest's loop rates.[172] Moreover, as demonstrated in the attached reply declaration of Robert Mercer and Dean Fassett, the TELRIC errors that inflate Qwest's Colorado loop rates also substantially distort the deaveraging process in Colorado, thereby creating yet an additional barrier to entry.

Qwest's non-loop rates also are substantially inflated by clear TELRIC errors.[173] Qwest's attempt to respond to one of those TELRIC errors plainly are deficient. As demonstrated by AT&T in its initial comments, Qwest's recurring switching rates double-count vertical features costs because Qwest's rates include a separate vertical features charge that is already captured in the switching rates. Qwest attempts to rebut this fact with a technical

[169] *See* Weiss Reply Decl. ¶¶ 3-10.
[170] *See id*.
[171] *See* Mercer/Fassett Decl. ¶ 13. The Colorado PUC responds only by pointing out that the rate-making process is difficult and that it believes that it did the best it could given that complexity. And Qwest has offered no legitimate response to these claims.
[172] *See* CPUC at 27-36
[173] *See* Mercer/Fassett Decl.

accounting argument. But as explained in the attached declaration of Michael Lieberman, Qwest's response only confirms that its rates double recover vertical features costs.[174]

C. Qwest's UNE Rates Create A Discriminatory "Price Squeeze."

Even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Idaho, Iowa and North Dakota violate Checklist Item Two.[175] Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Indeed, after accounting for an efficient entrant's internal costs of entry, the margins that are available to new entrants in Iowa, Idaho, and North Dakota are *negative*. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[176]

As explained in AT&T initial declaration, the existence of a price squeeze also precludes a grant of Qwest's application because a grant of Qwest's application would contravene the public interest. *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term "public interest" "take[s] [its] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a

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[174] *See* Lieberman Decl. ¶¶ 33-37. Qwest also attempts to rebut the fact that its switching fill factors are vastly understated by pointing out that sometimes a switch port may be used by a "warm dial tone" event though no customer is currently being served by that line. But the TELRIC compliant switching fill factor advocated by AT&T includes sufficient excess capacity to account for residential and business turn-over.

[175] *See* WorldCom at 32-34; AT&T at 69-71.

[176] *See* AT&T at 69-71.

time when their local monopolies would give them an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping." *AT&T* v. *Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "'fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within'" that band. *Id.* at 564 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Qwest's rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

Furthermore, as other courts have recognized, implicit subsidies – "that is, 'the manipulation of rates for some customers to subsidize more affordable rates for others'" – are fundamentally incompatible with efficient competition. *See Alenco Communications Inc.* v. *FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Accordingly, Section 254(d) expressly authorizes state commissions to adopt universal service mechanisms to convert intrastate implicit subsidies into explicit subsides. *See* 47 U.S.C. § 254(f). To be sure, some states have chosen for policy reasons of their own to maintain the pre-existing system of implicit subsidies, and have thus far declined to establish a competitively neutral system of explicit subsidies. To the extent that those policies facilitate a price squeeze, however, Section 271 precludes the Commission from granting interLATA authority in that state. And there is no rational basis for the Commission to disregard its public interest and nondiscrimination mandates and to reward state commissions and RBOCs that choose to maintain competition-foreclosing regulation that is contrary to the terms and core competitive purposes of the 1996 Act.

Qwest advances a scattershot of baseless criticisms against AT&T's margin analysis. First, Qwest asserts that AT&T improperly reflected Qwest's OSS rate as a recurring rate and not as a non-recurring rate. But as explained above, Qwest's OSS rate is currently listed in Qwest's SGATs as a recurring rate.[177]

Second, Qwest claims that AT&T should not account for NRCs because AT&T can pass those NRCs on to its customers. That argument ignores the current competitive environment. Qwest currently serves virtually all local residential customers. Therefore, new entrants must convince existing Qwest residential customers to switch carriers. A business plan that charges residential customers a large up-front charge for making switch is not economically viable because customers will not pay for the privilege of switching to a new carrier. Nor is it economically feasible for a CLEC to increase local rates to recover NRCs. CLEC rates are effectively capped by the rates charged by the incumbent LEC because customers will not switch to a new entrant that is charging higher rates. As a result, CLECs must recover NRCs through local rates, that are no higher than those charged by incumbent LECs. AT&T's margin analysis correctly reflects that reality.[178]

Third, Qwest claims that AT&T's access revenue estimates are too low. Those access revenues are based on actual observed average toll-related minutes of use from TNS Telecoms

[177] *See* Lieberman Reply Decl. ¶ 25.
[178] *See id.* ¶ 26

Bill Harvest market research.[179] Qwest does not challenge the accuracy of either of those inputs. Instead, Qwest asserts that AT&T's access revenues are too high because they are higher than Qwest's estimates.[180] The primary reason that Qwest's estimates are higher than AT&T's estimates is that Qwest (not AT&T) incorrectly computed access revenues.[181]

Fourth, Qwest claims that AT&T and WorldCom's analysis is flawed because they compute margins based on state-specific data. That argument is specious. The purpose of a margin analysis is to determine whether entry is economically feasible in a particular state.[182] To make that determination, it is necessary to account for the actual conditions in that state, including the actual number of minutes in that state. A proper margin analysis – like the analysis performed by AT&T and WorldCom – therefore must reflect state-specific minutes.[183]

Fifth, Qwest claims that the residential line weightings used in AT&T's analysis are undisclosed. In fact, the line weightings used in AT&T's margin analysis are those reported by Qwest on Qwest's web site.[184]

Sixth, Qwest claims that AT&T's analysis fails to account for the possibility that new entrants will find higher margins by offering a mix of residential and UNE-P services. Qwest is wrong. As explained in the declaration of Michael Lieberman, AT&T's analysis computed both the UNE-P margins and the resale margins that are available to new entrants in each zone. AT&T's state-wide margin figures are based on the higher of the two margins (the UNE-P and resale margins) that are available to new entrants in each zone.[185]

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[179] *See Id.* ¶ 27.
[180] *See id.*
[181] *See id.*
[182] *See* Lieberman Reply Decl. ¶ 28.
[183] *See id.*
[184] *See id.* ¶ 29.
[185] *See id.* ¶ 30.

Seventh, Qwest claims that AT&T's stated internal costs of more than $10.00 are not supported. That claim also is false. The declaration of Steven Bickley explains in detail how the $10.00 figure was computed. Furthermore, Mr. Bickley demonstrated that the $10.00 plus estimate is not based on AT&T's actual internal costs, but is based on (lower) projected figures that AT&T seeks to achieve in the future and that are a reasonable estimate of an efficient carrier's internal costs.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE.

AT&T demonstrated in its opening comments that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, in violation of its checklist obligations.[186] AT&T will not repeat those claims in these reply comments, but will simply note that with respect to two of those issues, developments since the comments confirm that Qwest's SGATs do not satisfy section 271.

First, in its recent *Virginia Arbitration Order*, the Commission held that the exception to the unbundled switching requirement for customers with four or more lines "applies on a 'per location' basis," and not on a "per-customer per wire center" basis, as Qwest's SGATs provide.[187] The Commission expressly found that "rule 51.319(c)(2) is best interpreted as applying when the competitive LEC is serving a customer that has four or more lines at a single location."[188] As the Commission explained, the "per-location" method is the only interpretation of the UNE Remand Order that is consistent with the language of the order and the purposes of

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[186] AT&T at 71-106 & Wilson Declaration.

[187] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for the Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 360 (rel. July 17, 2002) ("*Virginia Arbitration Order*").

[188] *Id*.

the four-line exception.[189] The Commission's *Virginia Arbitration Order* thus conclusively establishes that Qwest's Colorado SGAT, which provides that the exception "will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an End User Customer within a Wire Center,"[190] is unlawful and fails to satisfy section 271(c)(2)(B)(vi) (switching).[191]

Second, Covad's comments confirm that Qwest's refusal to build facilities for CLECs on the same terms that it builds for itself is discriminatory and unlawful.[192] Indeed, Covad also confirms that, when facilities are not available, rather than holding the order as it does for its retail customers, Qwest simply rejects the order (either immediately, as in Idaho, Nebraska, and North Dakota, or after 30 days, as in Colorado and Iowa).[193] And as noted above, Qwest's policy of rejecting orders artificially improves its provisioning performance.[194]

Qwest's refusal to build loop facilities for CLECs is particularly indefensible given that CLECs are already paying for new facilities in loop rates. The cost models that generate Qwest's loop rates contain "fill factors" that are supposed to provide enough capacity to meet current demand, a reasonable amount of growth, a capacity for administrative spares. The lower the fill factor, the more spare or excess capacity is built into the network, which increases cost on a per unit basis for the current customer base or CLEC purchasing UNEs. For example, if the fill factor used for DS1 loops is 50%, the assumption is that Qwest will have a spare DS1 for every DS1 in use, *i.e.,* double the investment currently required for DS1. When the CLEC pays for a DS1 loop, it is paying for a network that has been actually priced based on 2 DS1s. If Qwest

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[189] *Id.* ¶¶ 361-63.

[190] SGAT §§ 9.11.2.5.2, *see also id*. § 9.11.2.5.1. In this five-state application, this issue is applicable only to Colorado, because Denver is the only MSA in these states in which the switching carve out exception applies.

[191] *See* AT&T at 95-98.

[192] *See* Covad at 34; AT&T at 82-85; *Local Competition Order* ¶ 315.

[193] *See* Covad at 35-36; AT&T at 84-85.

[194] *See* Covad at 36.

refuses to build new facilities, thereby allowing the utilization and thus the fill factor to increase, CLECs will be forced to overpay for the UNEs. For these and the many other reasons laid out in AT&T's opening comments, Qwest's SGATs fail to meet the requirements of Section 251(c).

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272.

Nothing in the comments that have been submitted changes the fundamental fact that Qwest has utterly failed to meet its burden of establishing that Qwest and its section 272 affiliate will comply with each of the requirements of section 272 if Qwest's application is granted. Despite the critical nature of section 272 compliance, *e.g.*, *Texas 271 Order* ¶ 395, the few commenters that have discussed section 272 compliance – the state commissions of Colorado, Iowa, and North Dakota – present no new evidence to meet Qwest's burden. In fact, these comments do not even discuss, let alone refute, the matters raised in AT&T's opening comments that established Qwest's failure to meet its burden of proof.

For example, none of the commenters discuss Qwest's failure, as found by the Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Qwest's bare promises on this topic should be afforded no weight, especially given that Qwest chooses to not even describe its network ownership plans except in the vaguest terms.

The limited comments from the state commissions on section 272 also present no further evidence concerning the requirement, in section 272(b)(3), that Qwest and its section 272 affiliate have "separate officers, directors, and employees." As the Minnesota ALJ found, Qwest is barred by section 272(b)(3) from maintaining an integrated workforce of BOC and affiliate employees, with regular "transfers" back and forth between the companies and overlapping reporting relationships. The only commenter that even discusses compliance with section

272(b)(3) – the comments from the North Dakota commission, *see* pp. 189-90 – simply recite Qwest's promises concerning employee separation, without reviewing any tangible evidence as called for by the Minnesota ALJ.

Nor do any commenters discuss or refute the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all of their transactions. And no commenter has explained how Qwest can be found to have posted all section 272 affiliate agreements when no agreements are posted to reflect the (undisputed) coordinated, planned transfer of employees between these companies.

Finally, the commenters offer no discussion concerning Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g). As AT&T established in its opening comments, echoing the findings of the Minnesota ALJ earlier this year, the joint services on which Qwest and its affiliate are dependent present both the opportunity and incentive for serious misuse of confidential information. Qwest and the commenters do not even acknowledge this problem, let alone present any evidence of Qwest's efforts to prevent the misuse of such confidential information by joint-service providers. Similarly, the commenters, like Qwest in its application, ignore Qwest's obligations to submit tangible proof of its planned compliance with the joint-marketing restrictions under section 272(g) (including the equal access requirements), despite the fact that Qwest already billed the affiliate over $500,000 for joint-marketing planning.

At bottom, the limited comments submitted concerning section 272 compliance highlight, rather than remedy, the core problem with Qwest's application. Qwest cannot meet its burden by relying (as it does) on paper promises of section 272 compliance, especially in light of the multiple and specific findings of noncompliance by the Minnesota ALJ.

VI. QWEST'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and other anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Specifically, over the past five years, Qwest and its predecessor US WEST engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it launched illicit efforts to provide service across LATA boundaries.[195] In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing and to provide access to inside wiring in multiple dwelling units.[196] And, as discussed above, Qwest has been revealed to have entered patently discriminatory secret interconnection deals, failing to file the agreements as required by Section 252, and worse yet, attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs.[197]

These ongoing anticompetitive and unlawful actions conclusively refute Qwest's claim that it is, and will remain, "committed" to accelerating and completing "the process of opening its local markets to competition."[198] Both CompTel and Touch America have also cited

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[195] AT&T Comments at 119-133.
[196] *Id*. at 122-123, 130-133.
[197] *Id.* at 18-27, 120-122.
[198] *See* Qwest Application at 2.

extensive evidence before the Commission that, through an attempt to characterize its interLATA communications services as "IRUs" or long-term leasing of facilities, Qwest has intentionally circumvented the clear language and purpose of Section 271.[199] Other commenters have confirmed Qwest's pervasive pattern of entering into secret interconnection deals and purchasing CLEC silence in the Section 271 review process warrant a denial of Qwest's application.[200]

The DOJ has acknowledged that Qwest's secret deals, in particular, "are serious and deserve the Commission's careful attention."[201] The DOJ even recognizes that, if "the Commission finds that a violation has occurred, sanctions may be appropriate *and could include suspension or revocation of any Section 271 authority that the Commission may have granted in the interim*."[202] Nevertheless, despite recognizing that these allegations "ultimately may raise questions as to the quality of the record,"[203] the DOJ stops short of recommending the denial of Qwest's applications pending review of the extent of Qwest's misconduct and the effect of that misconduct on the record.[204] Of course, it is the Commission that holds the responsibility for determining whether granting the applications would serve the public interest.[205]

And this clearly is the time and the case for the Commission to demonstrate the courage of the convictions that underlie the Act. The Commission must refuse to grant Qwest the right to provide interLATA services until Qwest has eradicated the consequences of its own

[199] CompTel Comments at 7-13; Touch America Comments at 20-24.
[200] CompTel Comments at 15-17; New Edge Comments at 3-4; Touch America Comments at 24.
[201] *Id.* at 3.
[202] *Id.* (*emphasis added*).
[203] *Id*. at 4.
[204] *Id*. at 5. Instead, the DOJ advocates assessing sanctions in another Commission proceeding, initiated by Qwest, in the very effort to distract and delay the state commissions', and this very Commission's, more forthright evaluation and punishment of this activity. *See, e.g.,* DOJ Comments at 3 &n.6.

anticompetitive and unlawful actions, or proved that there have been no such consequences. Whatever pressure Qwest produces or applies, the Commission must recognize that granting Qwest's request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."[206] As the Commission has recognized in the past, no such finding is possible if the "BOC has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[207]

It is difficult to imagine a more compelling "public interest" case for the denial of Section 271 authority than the situation in which Qwest has placed the Commission. Every party, from the DOJ to competing CLECs to the states, has recognized the severity of Qwest's own conduct in negotiating, entering and concealing the secret interconnection agreements that *already* have been the subject of adverse findings by independent governmental bodies in Iowa, Arizona and Minnesota. In this time of national resolve to establish and mandate corporate responsibility and effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's malfeasance.

Qwest's conduct is part of an extensive tradition of contempt for the "market opening" provisions of the Act. From its three FCC-adjudicated violations of Section 271 to its ongoing violations of that section and the Qwest-US WEST merger orders, from its refusal to test UNE-P

[205] *Id*. at 3 (allegations "deserve *the Commission's* careful attention. The Department does not comment on whether Qwest's earlier failure to file the agreements violated Section 251 or 252. If *the Commission* finds that a violation has occurred . . .").
[206] *See SBC Texas 271 Order* ¶ 431.

in Minnesota to its entry inhibiting actions in Colorado and Washington, from its concealment of secret deals in Iowa to its similar concealment of such deals in Arizona and every other Qwest state, Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. And a grant of Section 271 interLATA authority will reward this strategy.

The entire industry is now watching to see just how low (or high) the bar will be set for future section 271 applications. Approval of this application is a signal to the industry that, whatever the possible consequences of violating the Act and the Commission's rules might be, those consequences would not include a rejection of a section 271 application. Future applicants would know that there is no need to set non-discriminatory UNE prices or provide potential new entrants with full access to adequate non-discriminatory OSS systems without fear of the Commission rejecting their Section 271 applications. And future applicants could (and would) substantially reduce opposition to their applications by bribing CLECs to not oppose their applications by offering secret deals to CLECs that agree to sit on the sidelines. It is imperative that the Commission send a clear signal to the industry that it will strictly enforce the competitive checklist and the public interest requirements, and that the applicant (not the opponents of the application) bears the burden of proving that it has complied with those pre-conditions of intraLATA entry.

There is no question that a comprehensive review of the extent and effect of Qwest's violations of Section 251, 252 and 271 is only appropriately and effectively conducted in the context of the evaluation of Qwest's application. Indeed, it is hard to imagine misconduct that strikes more directly at the heart of section 271 review. There can be no doubt that "questions"

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[207] *Michigan 271 Order* ¶ 397.

are ultimately raised "as to the quality of the record" on which Qwest rests to gain interLATA entry under Section 271.[208] As discussed above, the efficacy of Qwest's OSS tests has been compromised, because they relied in material part on evaluation of favorably-treated carriers. And at the very same time, Qwest's approach of "buying off" CLECs that were bringing forward evidence of Qwest's failure to adhere to the Act's market opening requirements has subverted the entire Section 271 process. Undoubtedly, the easy, non-confrontational course is to shift the analysis of the severity and effect of Qwest's behavior to some other future proceeding, where monetary penalties could be assessed, or perhaps even Section 271 authority suspended.[209] But the Act requires more responsible adherence to its terms. The Commission cannot sway from its obligation to ensure that the record *in this very proceeding* adequately supports the conclusion that Qwest has met its burden under Section 271. Rather, the Commission must show the courage and resolve to follow the path mandated by true adherence to the Act, and find that Qwest has not met its burden of demonstrating that a grant of Section 271 authority presently is in the public interest.[210]

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[208] DOJ Comments at 3.

[209] *See, e.g.,* DOJ Comments at 3; Colorado PUC Comments at 64; Idaho PUC Comments at 13; Iowa Utilities Board Comments at 68.

[210] Granting Qwest's application is not in the public interest for an additional reason as well. Even if Qwest's performance data were accurate – and they are not – Qwest's performance assurance plans contain fundamental flaws that prevent them from serving as an effective deterrent against future backsliding. Thus, for example, the performance assurance plans do not currently include any measure on service under accuracy. As a consequence, Qwest will suffer no financial consequences for subpar performance in this area. Furthermore, the Idaho performance assurance plan inappropriately limits the remedies CLECs may pursue against Qwest for discriminatory conduct. In accepting Qwest's argument that the QPAP does not unreasonably restrict the remedies available to CLECs (IPUC at 13), the Idaho PUC ignores that the QPAP explicitly states that, "[b]y electing remedies under the PAP, the CLEC waives any cause of action based on a contractual theory of liability," as well as "any right of recovery under any other theory of liability… to the extent that such recovery is related to harm under contractual theory of liability (*even though it is sought through a non-contractual claim, theory, or cause of action*"). Qwest Idaho SGAT, Third Revised Exhibit K, May 24, 2002, §13.6 (emphasis added). On its face, the QPAP unduly restricts the remedial relief that CLECs may seek for Qwest's subpar performance. Accordingly, unlike other performance assurance plans included in applications approved by the Commission, the Idaho QPAP shields Qwest from facing a broad spectrum of consequences that would assure that it "continues to provide non-discriminatory service to competing carriers." *Texas 271 Order* ¶424. Similarly, although the Iowa Utilities Board contends "that the Iowa QPAP will provide sufficient assurance that markets will remain open after a grant by the FCC of auditing to provide in-region, interLATA services in the State of Iowa" (IUB at 70), it ignores that the

QPAP permits Qwest to challenge the authority of the State to make any changes to the plan. As a result, the Iowa QPAP "leave[s] the door open unreasonably to litigation and appeal," and creates the very real risk that the QPAP will not reflect the dynamism in the telecommunications market as this Commission has envisioned. *New York 271 Order*, ¶433. For these and other reasons, the performance enforcement plans included in the Application cannot possibly be effective in assuring that Qwest will satisfy its statutory obligations in the wake of Section 271 relief.

CONCLUSION

For the foregoing reasons, and for the reasons set out in AT&T's initial comments, Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota should be denied.

Respectfully submitted,

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July 29, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 29, 2002
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/s/ Peter Andros

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